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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 8.

ZIFFRIN, Incorporated, - - - - - - - Appellant,

versus

JAMES W. MARTIN, Commissioner of Revenue of the Commonwealth of Kentucky, Et Al., - - Appellees.

BRIEF FOR APPELLANT.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 8.

ZIFFRIN, INCORPORATED, - - - - - *Appellant,*

v.

JAMES W. MARTIN, ET AL., - - - - - *Appellees.*

ERRATA SHEET TO BRIEF FOR APPELLANT.

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page iii, lines 3 and 4; in line 3, delete comma following word "thereon"; in line 4, substitute word "injunctive" in lieu of word "injunction," so that lines will read:

"relying and acting thereon in denying appellant the injunctive relief prayed.....90–107."

page v, line 15, following abbreviation "U. S. C." interpolate "Title 28, Secs." so that line will read:

"Judicial Code, Secs. 238, 266, U. S. C., Title 28, Secs. 345, 380.....2, 14."

page vii, line 3, complete citation, so that line will read:

"*Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, (de-"

page vii, line 8, complete citation, so that line will read:

"*Clason* v. *Indiana*, 306 U. S. 439, (decided"

page viii, lines 1 and 2, complete citation, so that lines will read:

"*Eichholz* v. *Public Service Comm.*, 306 U. S. 268 (decided Feb. 27, 1939) .....24."

page viii, line 14, complete citation, so that line will read:

"*Gibbs* v. *Buck*, 307 U. S. 66, (decided Apr. 17,"

page 2, line 3 of first paragraph, following abbreviation, "U. S. C." interpolate "Title 28" so that line will read:

"cial Code §§238 and 266, U. S. C., Title 28, §§345 and 380 re-"

page 24, lines 23 and 24, complete citation to *Eichholz* v. *Public Service Comm.*, by supplying,

"306 U. S. 268"

page 25, line 14, complete citation to *Clason* v. *Indiana*, by supplying, "306 U. S. 439"

page 29, lines 19 and 20, complete citation to *Clark* v. *Paul Gray, Inc.*, by supplying,

"306 U. S. 583"

page 118, lines 31 and 32, complete citation to *Gibbs* v. *Buck*, by supplying,

"307 U. S. 66"

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 8.

ZIFFRIN, INCORPORATED, - - - - - - *Appellant,*

v.

JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY, ET AL., - - - - - - *Appellees.*

BRIEF FOR APPELLANT.

I.

REFERENCE TO OFFICIAL REPORT OF OPINION BELOW.

The opinion of the specially constituted Statutory Three-Judge Court, sitting as the United States District Court for the Eastern District of Kentucky, delivered below, and being the only opinion delivered by the Court below, is officially reported, under the style, "*Ziffrin, Inc.*, v. *Martin, Et Al.*," in 24 Fed. Supp. 924.

II.

GROUNDS UPON WHICH JURISDICTION OF SUPREME COURT OF THE U TED STATES IS INVOKED.

Stated in general terms of ultimate legal effect, the jurisdiction of this Court is invoked under *Judicial Code, §§238 and 266, U. S. C., §§345 and 380,* respectively, on the ground that this is a direct appeal from the final judgment and decree of a Statutory Three-Judge Court, sitting as the District Court of the United States for the Eastern District of Kentucky (R. 65, 71), denying appellant—after notice and hearing (R. 32, 64, 65, 66)—both an interlocutory and a permanent injunction (R. 67, 68) suspending and restraining the enforcement, operation and execution of a certain Kentucky statute known as the "Alcoholic Beverage Control Law," hereinafter identified, by restraining the action of public officers of Kentucky in the enforcement and execution of the statute.

The cause's concrete facts substantiating the foregoing general statement and showing this Court's jurisdiction to attach as mentioned, have been set forth at length in appellant's Jurisdictional Statement heretofore filed in the District Court below and heretofore printed by the Clerk of this Court, and an expanded detailed statement of those same concrete facts is set forth, of necessity, in the "Statement of the Case" appearing as the next numbered section of this brief. No useful purpose would be served by a repetition of

the particularized statement of the jurisdictional facts and, in the interests of brevity, we beg leave to omit restating them in this section of the brief, to invite the Court's attention to the immediately succeeding section hereof, and to ask that it be read and considered as a part of our statement of the grounds upon which the Court's jurisdiction is invoked.

III.

STATEMENT OF THE CASE.

The appellant, Ziffrin, Incorporated, plaintiff below (and hereinafter sometimes so denominated)—an Indiana corporation (R. 1, 2) and an authorized interstate contract carrier of property by motor vehicle, engaged in carrying exports of whiskey exclusively *from* Kentucky in interstate commerce—seeks in this action to restrain and enjoin the appellees, defendants below (and hereinafter sometimes so denominated) from enforcing, and from attempting or threatening to enforce, against the plaintiff, its officers, employees, automotive equipment and consigned cargoes of liquor, the contraband and penal provisions of the pretended 1938 Alcoholic Beverage Control Law of Kentucky (hereinafter sometimes called merely "*Control Law*") (R. 3-10; 39-43; 62, 63; 24, 25; 44-46). Plaintiff charges that the Control Law contravenes the Commerce Clause of the Constitution, *Art. 1, Sec. 8, Cl. 3,* and the *Due Process* and *Equal Protection Clauses* of the *Fourteenth Amendment* (R. 22, 23, 25, 26) because,

under pain of extravagant penalties (R. 14-16, 63), the Control Law prohibits plaintiff from carrying *exports* of intoxicating liquors from Kentucky in interstate commerce merely because plaintiff is a *"contract"* instead of a *"common"* carrier of freight by motor vehicle for hire (R. 15, 18, 19, 25, 26). No evidence was offered by defendants in opposition to the application for a preliminary injunction or in support of their motion to dissolve the temporary restraining order. The Court below held, as a matter of law, that the Control Law is constitutional, and by its final decree denied plaintiff the injunctive relief sought and dismissed the complaint (R. 48-62; 65, 67, 68). From the order and final decree denying it interlocutory and permanent injunctive relief, plaintiff prosecutes this appeal (R. 71, 73, 77, 78).

The complaint as amended alleges and presents, and defendants' motion to dismiss the bill confesses, the following facts:

Continuously since March 20, 1933, and at all of the times involved, the plaintiff, Ziffrin, Incorporated, has been, and is an Indiana corporation, domiciled at Indianapolis, Indiana, authorized by its charter to engage, and actually engaged, in the business of an *interstate contract carrier* of freight by motor vehicle for hire (R. 1, 2). Defendants are the Commissioner of Revenue of Kentucky, the Attorney General of Kentucky, the members of the Alcoholic Beverage Control Board, created by the aforementioned Control Law, the Assistant Attorney General assigned to said Con-

trol Board, and one of said Board's Field Representatives, all officers and citizens of Kentucky, and all charged by law with the duty of enforcing said Control Law (R. 2-4; 11-13; 23, 39). *On July 1, 1935,* and prior thereto, plaintiff was, and continuously since has been, in *bona fide* operation as a contract carrier of freight by motor vehicle for hire between Louisville, Ky., and Chicago, Ill., via Indianapolis, Ind., and elsewhere, conducting operations in interstate commerce along and over Federal Aid Highways, U. S. Nos. 31, 52 and 41, which routes have been, and are, the direct, usual and convenient, and only commercially practical and feasible routes for motor carriers of freight from Louisville, Ky., to Chicago, Ill., via Indianapolis, Ind. (R. 3, 6, 7, 41, 42). On September 30, 1935, the Interstate Commerce Commission properly extended to and including February 12, 1936, the time within which such interstate contract motor carriers might file applications for operating permits (R. 7). On February 4, 1936, plaintiff filed application with the Interstate Commerce Commission for a permit to operate as an interstate contract motor carrier of freight for the aforementioned territory and routes, which application since has continued, and now continues, pending and undetermined before the Interstate Commerce Commission (R. 7, 42), with the consequence that under the express and explicit provisions of *Federal "Motor Carrier Act, 1935"* (U. S. C. A., Title 49, *Sec. 309,* Appendix hereto, 22, 31, 32), continuance of plaintiff's operations has been, and is, lawful (R. 7, 8).

In October and November, 1936, plaintiff entered into written contracts with Schenley Products Co. and Jos. E. Seagram & Sons, Inc., and their affiliates, all engaged in the business of whiskey distillers, to transport for hire by motor vehicles, consignments of whiskies sold by the distillers and to be delivered by them to the plaintiff, in Louisville, Jefferson County, Kentucky, and at points within a distance of ten miles of its corporate limits, intended and consigned by said bailors for immediate transportation and delivery to the consignee-purchasers of said whiskies at such consignees' respective places of residence and business location in Indianapolis, Ind., Chicago, Ill., and at other places situated north of the Ohio River (R. 4, 5, 62). At all times subsequent to January 1, 1935, the plaintiff has had, and now has, transportation contracts with other customers, whose residences and places of business are located in Indianapolis and in Chicago, and in other places situated in the States of Indiana and Illinois and in other States lying north of the Ohio River, which contracts provide that the plaintiff shall carry and transport for those customers consignments of liquors purchased by them from whiskey distillers and other whiskey vendors having their places of business in Louisville, Kentucky, and within a radius of ten miles of its corporate limits. The last mentioned contracts contemplate and provide that plaintiff shall receive the consignments of liquors from the distillers and vendors in Louisville, and within the mentioned ten-mile radius, consigned

by the distillers and vendors thereof for delivery to the consignee-customers at their aforementioned places of residence and business domicile and location (R. 39, 40). At all times subsequent to their execution the aforementioned contracts have continued to be, and are, in full force and effect, and pursuant thereto plaintiff has carried large quantities of whiskies from Louisville, Ky., and immediate vicinity, to Indianapolis, Ind., Chicago, Ill., and other places situated north of the Ohio River (R. 5, 6, 40, 41). All of said consignments of liquors, received for transportation and transported by the plaintiff as aforementioned, were designated and intended by the consignors thereof for immediate, uninterrupted and continuous transport to destination, and were so carried and transported by the plaintiff (R. 5, 41, 63).

On no occasion has plaintiff carried any liquor, or other freight, from any point in Kentucky for delivery to any other place in Kentucky (R. 6).

At all times since the execution of the contracts with Schenley and Seagram, the transportation of whiskey and alcoholic liquors as aforementioned has constituted the principal and major portion of plaintiff's motor transportation business from Louisville to Chicago (R. 9).

All of the plaintiff's activities penetrating into the State of Kentucky in connection with the transportation of intoxicating liquors, have consisted solely and exclusively in carriage and transportation necessarily incidental to sales of such intoxicants sold for delivery

by persons doing business as distillers and vendors in Louisville, and in its immediate vicinity, and so sold by them for delivery to purchasers residing and situated in States lying north of Kentucky, under contracts of sale and delivery requiring the delivery of such merchandise to the purchasers thereof at the lafter's aforementioned places of residence, domicile and business location, and have consisted solely and exclusively in carrying such *exports out of* Kentucky (R. 10, 43). The aforementioned Federal-Aid Highways have been used and employed by the plaintiff in conducting its aforementioned operations of carrying exports of whiskies (R. 6, 41, 42).

The branch of plaintiff's freight transportation business devoted to the carriage of liquors exclusively in export has been, and is, an established and profitable one (R. 4, 9). During the period of one year next preceding *July 1, 1938*, and in its business of carrying exports of liquors, plaintiff owned and operated 7 trucks, operated a total of 25 trucks, employed 40 men, had a capital investment in excess of $10,000.00, and realized net operating gains and profits in an amount exceeding $7,500.00 (R. 10, 44). The business has been, and is, a growing and expanding one, and has present prospects of substantial increase in extent, volume, and net operating profits (R. 44).

Louisville is a city of the first class (R. 42), and all of plaintiff's operations in Kentucky have been in Louisville and within a radius of ten miles thereof, and so within the purview of those provisions of the *Ken-*

tucky Motor Vehicle Transportation Act (Ky. Stats., Secs. 2739j-42 and 2739j-94; App., 13 and 20), which grant *exemption* from compliance therewith, including obtention of certificate of convenience and necessity (R. 9, 10, 41, 43). (The exemption is valid. *Continental Baking Co. v. Woodring*, 286 U. S. 352; *Welch Co. v. New Hampshire*, 306 U. S. 79.)

Plaintiff complied with applicable regulatory Kentucky laws ante-dating the Control Law. In 1934 plaintiff made application to the Division of Alcoholic Control of the Department of Business Regulation of Kentucky for a special liquor transportation permit provided for by the then existing Kentucky law. The application was granted and a special liquor transportation permit was issued to the plaintiff, and thereafter, and from year to year, the permit was renewed and continued in effect, to and including *June 30, 1938*, the day preceding the date upon which the license provisions of the Control Law in question became effective. (R. 8, 9). On *July 27, 1936*, under a prior law, and upon plaintiff's application therefor, the Kentucky Department of Motor Transportation granted plaintiff a permit to transport whiskey and distilleries' supplies (R. 9). None of the permits or licenses so granted ever has been revoked or cancelled (R. 9).

On *May 20, 1937*, the plaintiff duly and properly designated a process agent in Kentucky (R. 9).

On *March 7, 1938*, the Governor of Kentucky signed and approved the *Control Law* (R. 11), the *license provisions* of which became *effective July 1, 1938*, and it

thereupon became incumbent upon plaintiff, if it were to continue to engage in its whiskey export business *conformably with the terms of the Control Law* (*Sec. 18, Subsec. 7;* App. 1, 5) to have and to possess the *liquor Transporter's License* provided for therein (R. 18).

In order to be eligible to obtain the liquor Transporter's License from the Kentucky authorities, it was necessary for plaintiff to have a *common carrier's certificate* issued by the Division of Motor Transportation of Kentucky (R. 15, *Control Law, Sec. 54* (7), App. 10). Under the provisions of the existing and applicable Kentucky statutes, a motor carrier is eligible to receive the common carrier's certificate only (a) if applicant is engaged in the business of common carriage, and then only (b) upon establishing to the satisfaction of the Division of Motor Transportation that applicant's proposed operations are convenient and necessary in the public interest (Ky. Stats., Secs. 2739j-46 to 2739j-51; App. 14-16).

Obviously, the plaintiff being a contract carrier and not being engaged in the business of common carriage, is ineligible to receive the common carrier's certificate and, consequently, is ineligible to receive the liquor Transporter's License assumed to be required by the Control Law. Nevertheless, in order to comply with the pertinent Kentucky statutes insofar as the same properly might be regarded as valid inspection measures and registration requirements, plaintiff, on *June 4, 1938*, applied to the Division of Motor Transporta-

tion (*1936 Governmental Reorganization Act*, App. 21, 22) for a *common carrier's certificate* to operate a motor freight line from Louisville, Ky., to the Indiana state line over U. S. Highway No. 31, in interstate commerce only, and paid the required $25.00 fee; on *June 7, 1938*, plaintiff *applied for the liquor Transporter's License*, paid the required $10.00 fee, with surety executed and filed the required bond, and gave the required newspaper notice and filed proof thereof (R. 18, 19). June 23, 1938, upon the hearing of its application for a common carrier's certificate, plaintiff frankly stated and disclosed to the Director of the Division of Motor Transportation that plaintiff's business and operations were not those of a common carrier, but were those of a contract carrier, and that plaintiff sought the common carrier's certificate merely to render itself eligible to receive the liquor Transporter's License (R. 18). *June 30, 1938*, plaintiff's application for the common carrier's certificate was denied by the Director of the Division of Motor Transportation, who rested his decision upon the ground, expressed and assigned by him in writing, that the plaintiff had been, and was, engaged in the business of a contract carrier—that plaintiff had not been, and was not, engaged in the business of a common carrier of freight (R. 19, 62). Plaintiff's application for the common carrier's certificate having been denied, plaintiff (according to the terms of the Control Law) was rendered ineligible to receive the liquor Transporter's License (R. 19), and on July 8, 1938, the defendant,

James W. Martin, Commissioner of Revenue of Kentucky, and the aforementioned Alcoholic Beverage Control Board, denied plaintiff's application for the Transporter's License, and notified plaintiff of that denial (R. 20).

The Control Law assumes to provide extreme and severe penalties for a corporate motor carrier, its responsible officers and employees (maximum—*ten years and $10,000.00*), who may undertake to engage in transporting liquors without holding the required Transporter's License, and for the seizure and confiscation, as contraband, of trucks so engaged and of cargoes of intoxicants carried by an unlicensed carrier (*Control Law, Secs. 52, 53, 89 and 94;* App. 8, 9, 10; R. 14, 15, 16). Subsequent to July 1, 1938, defendants threatened the plaintiff and its officers, employees, automotive equipment, and the plaintiff's customers' cargoes of liquors entrusted to plaintiff for carriage *in exportation from Kentucky in interstate commerce,* with enforcement of the Control Law's penal, criminal, contraband and confiscatory provisions, and unless enjoined and restrained by the Court, defendants intend to enforce, and will attempt to enforce, the Control Law's provisions (R. 21, 23). The threats of enforcement intimidated plaintiff's customers and caused them to discontinue doing business with the plaintiff, to plaintiff's great loss and damage (R. 21, 22). Continuance of the threats will destroy plaintiff's interstate liquor export transportation business, with resulting irreparable loss, not susceptible of defi-

nite ascertainment or statement in pecuniary terms, but in an amount exceeding $75,000.00 (R. 22). For protection against that loss, and against the threatened seizures and forfeitures, and against threatened infliction of drastic fines and terms of penal servitude, and threatened prosecutions, plaintiff has no adequate remedy at law (R. 22, 23). The threatened civil, criminal, penal and confiscatory actions and proceedings exceed 10 in number, and would prove vexatious, unwarranted and unjustified (R. 63).

The complaint as amended charges the Control Law to be unconstitutional and repugnant to the Commerce, Due Process and Equal Protection Clauses, in that, under pain of excessive penalties, it assumes to bar plaintiff, in its character of an authorized interstate contract carrier, from continuing to engage in its established and profitable business of transporting exports of liquors *from* Kentucky in interstate commerce, exclusively (R. 22, 25, 26).

The record further shows:

July 18, 1938, plaintiff's original bill of complaint and the first amendment thereto praying that public officers of Kentucky be enjoined from enforcing or executing said control against plaintiff, were filed simultaneously in the U. S. District Court, for the Eastern District of Kentucky, and subpoena issued thereon was duly executed (R. 1, 25, 27). July 19, 1938, pursuant to notice, plaintiff made application for and was granted a temporary restraining order in conformity with the prayer of the bill (R. 28-33), and

plaintiff having announced to the Court that it proposed to apply for a preliminary injunction, the Judge of the District Court, pursuant to *Judicial Code, Sec. 266,* called to his assistance another District Judge and a Judge of the Circuit Court of Appeals for the Sixth Circuit, to hear and to determine the application for a preliminary injunction, which application the parties agreed might be heard at Louisville, Ky., on July 26, 1938 (R. 33). The notices to the defendants, Governor and Attorney General, of the application for the preliminary injunction and the hearing thereof, required by *Judicial Code, Sec. 266,* were duly served and waived (R. 32, 34, 37, 38, 64, 66). On July 26, 1938, and at Louisville, and before the Statutory Three-Judge Court, plaintiff filed its motion for a preliminary injunction in conformity with the prayer of the complaint and supporting affidavits, defendants filed their motion to dissolve the temporary restraining order and to dismiss the complaint as amended; upon suggestion of the Court and by agreement of the parties, by counsel, consideration of the application for the preliminary injunction was deferred until the cause might be heard upon defendants' motion to dissolve the restraining order and to dismiss the complaint; arguments were heard upon defendants' mentioned motions, consideration of the motion for the preliminary injunction was deferred, the temporary restraining order was continued in effect pending determination of the motion to dismiss, and *the restraining order thereby virtually was converted into a preliminary injunction* (R. 35-38).

While the cause was under submission upon defendants' motion to dissolve and to dismiss, and with the assent of defendants' counsel, courteously granted, plaintiff filed second and third amendments to its bill, which amendments did not alter the nature of plaintiff's claim for relief (R. 38-47, 62-64). The motions to dissolve and to dismiss were extended to the bill as thus amended (R. 48, 64, 66).

On October 15, 1938, the Court rendered its *Opinion*, holding, as a matter of law, that the Control Law is not repugnant to the Constitution, but represents a valid exercise of the State's police power (R. 48-62).

On November 22, 1938, the Three-Judge Court entered a *final decree* which, among other things, set aside so much of the Court's prior order as had deferred consideration of plaintiff's application for a preliminary injunction, ordered the cause submitted forthwith upon that motion, and overruled the same. The final decree likewise sustained defendants' motion to dissolve the temporary restraining order and to dismiss the complaint as amended, and dismissed the complaint accordingly. The final decree below extended the Court's Opinion to the complaint as amended, including the third amendment thereto, and constituted that Opinion the Court's *Conclusions of Law*, and stated that the Conclusions *express the sole and exclusive grounds upon which the Court held the Control Law to be constitutional* and the plaintiff not to be entitled to the injunctive relief prayed. To protect the plaintiff's rights, the decree granted plaintiff

exceptions and an injunction pending this appeal (R. 65-70).

The appeal was seasonably and duly prayed, allowed and perfected (R. 71-85).

IV.

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED.

Appellant will urge the following assigned errors specified both in its Assignment of Errors and in its Statement of Points to be Relied Upon (R. 73-77; 79-83), to-wit:

The Court below *erred:*

1. In overruling plaintiff's motion for a preliminary injunction;

2. In sustaining defendants' motion to dissolve the temporary restraining order;

3. In sustaining defendants' motion to dismiss the complaint as amended, and in dismissing the same;

4. In determining and ruling, and in stating as its *Conclusions of Law,* and *in making the same the grounds of its action in rendering the aforesaid decisions,* and each of them,—

(a) That in application to the plaintiff and its business, the Control Law does not contravene the *Commerce Clause, Art. 1, Sec. 8, Cl. 3,* of the Constitution of the United States;

(b) That in application to the plaintiff and its business, the Control Law only remotely and incidentally affects and burdens interstate

commerce, and that it does not represent and constitute a direct and substantial burden upon, interference with, and obstruction and prohibition of commerce along the several states;

(c) That regulation by the General Assembly of Kentucky of the transportation of intoxicants by motor carriers of property for hire in export from Kentucky to sister States, and the General Assembly's action in prohibiting interstate contract carriers of property by motor vehicles for hire (including plaintiff), from continuing to engage in such interstate exportation business, is a matter of local concern, as distinguished from a matter of National concern;

(d) That the Congress of the United States by Motor Carrier Act, 1935, has not legislated with respect to the transportation of such intoxicants by contract carriers by motor vehicles for hire in export in interstate commerce;

(e) That National legislation governing and controlling interstate transportation, exportation, and exports, of the kind and character aforesaid, is lacking;

(f) That the supposed omission of Congress to legislate with reference to the subject of transportation by contract carriers by motor vehicle for hire of intoxicating liquors exported in interstate commerce, is equivalent and tantamount to an invitation by the Congress to each of the several States to enact its own laws governing said supposed open field of regulation;

(g) That such liquors, sold and consigned by the aforementioned vendors and consignors thereof, and to be delivered pursuant to the contracts of sale to the consignee-purchasers thereof, domiciled and residing in Indianapolis, Chicago, and other points situated north of the Ohio River, and delivered to the plaintiff in Louisville and immediate environs, intended, consigned and destined for immediate, direct and continuous carriage for delivery to the consignees at their places of residence and business location, are not to be regarded as being in interstate commerce or entitled to the protection of the Commerce Clause;

(h) That because it is competent for a state to prohibit the manufacture of such intoxicants, then if a state permits the manufacture thereof it is competent for the state to control the manufactured product, which includes power to control the transportation thereof in exportation in interstate commerce from such state to a sister state;

(i) That State police powers should be broadened;

(j) That the Control Law, in application to plaintiff and its business, in assuming to require plaintiff—as a condition precedent to continuing to engage in its business—to *convert* itself into a *common* carrier of property by motor vehicle for hire, to assume the added burdens and stricter liabilities appertaining to carriers of that character, and to establish to the satisfaction of Kentucky authorities that plaintiff's operations are convenient and

necessary in the public interest, does not constitute a taking of plaintiff's property without due process of law in contravention of the *Due Process Clause of the 14th Amendment* to the Constitution;

(k) That the Control Law's provisions, prohibiting plaintiff, merely because it is a *"contract"* (instead of a *"common"*) carrier of freight by motor vehicle for hire in interstate commerce, from continuing to engage in the conduct of its established, profitable and exclusively interstate business of transporting exports of whiskey from Kentucky, is a valid and reasonable regulation within the proper exercise of the police power of the State;

(l) That the Control Law, in providing that common carriers of property by motor vehicles for hire shall be eligible to transact such business of transporting exports of intoxicants from Kentucky in interstate commerce, and in declaring contract carriers of property by motor vehicles for hire, including plaintiff, to be ineligible to engage in said business, and, further, in providing penalties for violations of its mentioned provisions so extreme and severe as to preclude resort to the Courts in ordinary course, does not deny plaintiff the equal protection of the laws and does not deprive plaintiff of its property without due process of law; and

(m) That in determining the question of the validity and constitutionality of said Control Law it is incompetent for the Court to take cognizance of the Kentucky General Assembly's attempt and design to give *common* car-

riers of property by motor vehicles for hire a competitive advantage over *contract* carriers of property by motor vehicles for hire, by permitting the former class of motor carriers to engage, and by prohibiting the latter class of motor carriers from engaging, in the aforementioned business of interstate transportation of intoxicants in export from Kentucky.

V.

ARGUMENT.

(A) Summary of Argument.

The argument for appellant may be summarized:

1. The cases involving *intrastate* business may be put to one side as irrelevant. *Interstate* commerce cases of three distinct categories are distinguishable:

(a) Cases sustaining state regulation or prohibition of interstate commerce in noxious commodities which inherently are not the proper subjects of trade or commerce; (b) cases decided under the Webb-Kenyon Act and 21st Amendment, sustaining state regulation of *importation* of intoxicants in interstate commerce; and (c) cases sustaining exertions of the state's police power reasonably to regulate the *manner* of use made of its highways by interstate carriers by motor vehicle, in the absence of Federal legislation coinciding in the field.

These three types of cases respectively are distinguishable from the case at bar, because:

(a) Liquor is a legitimate subject of interstate commerce; (b) only *exports* of liquor are here in-

volved; and (c) the Control Law does not assume to regulate the use of the highways, and if it did so assume, the act would be invalid under the Constitution of Kentucky, Sec. 51, because the suggested subject is not mentioned in the act's title and the body of the act would relate to more than the single subject permitted, and the Control Law would be invalid for the further reason that the Control Law does not seek to regulate the *manner of use*, but rather to define *by whom* the highways may be used, and thus collides with both the Commerce Clause and with Motor Carrier Act, 1935, which authorize use of the highways by contract carriers of "property" by motor vehicle in interstate commerce.

2. In assuming to prohibit plaintiff, in its character of contract carrier by motor vehicle, from continuing to engage in its established business of transporting intoxicating liquors *from* Kentucky, exclusively in export and exclusively in interstate commerce, the *Control Law* constitutes a direct and substantial interference with interstate commerce in a matter of National concern, admitting of and demanding uniformity of treatment, conflicts with the commerce powers of the National Government and is, therefore, void.

3. *Motor Carrier Act, 1935,* controls interstate transportation by motor carriers of "property," generally (which includes intoxicating liquors), and with other Federal legislation, occupies the field of regulation, and supersedes the conflicting Control Law.

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4. In assuming to require plaintiff to convert itself into a *common* carrier of property by motor vehicle as a condition precedent to the exercise of plaintiff's constitutional right to continue to conduct its mentioned interstate export business, the *Control Law* deprives plaintiff of its property without due process of law.

5. The classification attempted to be made by the Control Law rendering *common carriers* by motor vehicle *eligible* to obtain the liquor Transporter's License and to engage in the business of transporting *exports* of whiskey *from* Kentucky, and rendering *contract carriers* by motor vehicle *ineligible* to obtain the requisite Transporter's License and therefore ineligible to continue to engage in the mentioned business—constitutes mere arbitrary selection, in that the distinction attempted to be drawn bears no reasonable relation to proper regulation of the liquor traffic, and the spurious classification consequently denies plaintiff the equal protection of the laws.

6. For violation of its terms, consisting in plaintiff undertaking to transport export cargoes of intoxicants from Kentucky in interstate commerce, the Control Law prescribes penalties so severe and extreme as to preclude resort to the Courts in ordinary course to test the validity of the mentioned interference with interstate commerce, with the consequence that the *Control Law*, on its face, further denies plaintiff the equal protection of the laws and assumes to deprive plaintiff of its property without due process.

7. The District Court below committed additional errors in making its *Conclusions of Law*, and in acting thereon in denying plaintiff injunctive relief, *because contrary to those Conclusions:*

(a) The Court possesses power to penetrate the transparent legislative design, embodied in the Control Law, to drive contract carriers by motor vehicle, including plaintiff, from the business of transporting liquors in export from Kentucky in interstate commerce, and legislatively to make a gift of plaintiff's established business to common carriers;

(b) If existent, the omission of Congress—erroneously supposed by the Court below to exist—to regulate the interstate export business in question would not be deemed an invitation extended by Congress to the states to regulate the business, but would evince the will of Congress that the business should remain unfettered;

(c) Export cargoes of intoxicants, upon delivery to the plaintiff in Jefferson County, Kentucky, destined and consigned for immediate, continuous and uninterrupted carriage for delivery to consignee-purchasers in Indiana and Illinois, are in interstate commerce and are protected by the Commerce Clause;

(d) Physical science may postulate that the greater includes the lesser, but although a state may prohibit the manufacture of liquor, if a state permits distillation, sale and transportation—as Kentucky does—the rule of law is that the state may not annex to its consent to manufacture and sell the unconstitutional ban

upon carriage of interstate exports of liquors by contract carriers; and

(e) There is no authority for the proposition that the Court, deliberately and on its own motion, should enlarge the state's police power so that it transcends or outweighs the commerce powers of the National Government.

8. None of the cases cited in the *Opinion* below is in point, or even tends to support the Conclusions of Law, or the rulings and decisions complained of upon this appeal, or any of them.

9. The requisite jurisdictional amount is in controversy.

10. The action was not prematurely brought.

11. Appellant is without adequate remedy at law.

(B) Distinguishable Situations in State Regulation of Matters Affecting Interstate Commerce.

The cases involving *exclusively intrastate business,* such as *Interstate Busses Corp.* v. *Holyoke Street Railway Co.,* 273 U. S. 45, 71 L. Ed. 530; *Hodge Drive-It-Yourself Co.* v. *Cincinnati,* 284 U. S. 335, 76 L. Ed. 323; *Stephenson* v. *Binford,* 287 U. S. 251, 77 L. Ed. 288, and (despite the subterfuge there attempted), *Eichholz* v. *Public Service Comm.,* —— U. S. —— (decided February 27, 1939), may be put to one side. National commerce power is not pertinent to the determination of such cases.

Coming to the cases of *interstate transactions,* and to put our contentions in sharpest focus, we desire at

the outset to concede that in *three types of distinguishable situations* it is competent for the state to exercise its regulatory powers with respect to matters affecting *interstate* transportation and commerce.

The first distinguishable situation is one in which a state undertakes to regulate interstate commerce in *commodities* which by reason of their essential nature are *not legitimate subjects of trade and commerce.* In such cases—at least where the state's action imposes only an incidental interference and Congress has not occupied the field by legislation of its own—it is competent for the state to regulate the commerce in *noxious substances,* despite its interstate character. A recent decision in this field—*Clason* v. *Indiana,* —— U. S. —— (decided March 27, 1939)—sustained an Indiana statute regulating the transportation of the decaying carcass of a horse over the state's highways enroute to Illinois. An earlier case of this same type is *Sligh* v. *Kirkwood,* 237 U. S. 52, 59 L. Ed. 835, where the Court sustained the validity of a Florida statute which made it unlawful for any one to sell, offer for sale, ship or deliver for shipment, any citrus fruit which was immature or otherwise *unfit for consumption,* the Court basing its decision on the grounds that there was no conflicting Act of Congress and that *unwholesome* foods are not legitimate subjects of trade and commerce. The District Court below relied upon *Sligh* v. *Kirkwood, supra,* and regarded liquors, apparently, as a commodity on a parity with unsound and unwholesome food-stuffs, rather beyond the pale, and ineligible

to receive the protection of the Commerce Clause (R. 54, 60, 62). However, despite the Webb-Kenyon Act and kindred Federal legislation, and the 21st Amendment to the Constitution (App. 37-47), insofar as the *exportation* of intoxicating liquors in interstate commerce is concerned, the commodity is a legitimate subject of commerce and is fully entitled to the protection of the Commerce Clause, as is shown *infra*, pp. 34-68.

The second distinguishable situation is presented by cases which have arisen subsequent to the enactment of the Webb-Kenyon Act and the adoption of the 21st Amendment, and which represent efforts by the states to regulate *importations* of intoxicants. Cases of this type are *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 61 L. Ed. 326 (decided under the Webb-Kenyon Act) and *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 81 L. Ed. 38; *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401, 82 L. Ed. 1424; *Indianapolis Brewing Co.* v. *Liquor Control Comm. of Mich.*, 305 U. S. 391, 83 L. Ed. 236, and *Finch & Co.* v. *McKittrick*, 305 U. S. 395, 83 L. Ed. 238 (all decided under the 21st Amendment). The case at bar is distinguishable from these five cases in that it presents attempted regulation of *exportation* in interstate commerce, and no authority exists, either under the 21st Amendment or under any Congressional legislation, empowering a state to regulate such exportation.

The third distinguishable situation is presented in motor carrier cases deciding, that to safeguard its highways and the traveling public, a state may make reasonable regulations concerning the manner of the highways' use, provided (a) there is an absence of congressional action, and (b) that the matters regulated are matters of merely local concern and that interstate commerce is affected only incidentally and remotely. This third type includes the following decisions:

The state may require the driver of the vehicle to procure a *license* (*Hendrick* v. *Maryland*, 235 U. S. 610, 59 L. Ed. 385; *Kane* v. *New Jersey*, 242 U. S. 160, 61 L. Ed. 222), and to *designate an agent for service of summons* (*Kane* v. *New Jersey, supra*). Where state authorities *waive* the requirement, expressed in the statute, that the interstate carrier shall show *public convenience and necessity* and the statute is administered so as to require nothing more than a certificate of *permission and registration*, the statute is valid (*Clark* v. *Poor*, 274 U. S. 554, 71 L. Ed. 1199). Where the route for which the certificate was sought was badly *congested*, and applicant's additional operations would have *been detrimental to public safety*, and it did not appear that an alternate route was not available, the state's denial of the certificate was proper (*Bradley* v. *Public Util. Comm.*, 289 U. S. 92, 77 L. Ed. 1053). Where the routes already were too heavily *congested*, the proposed operations would have been inimical to the *safety* and convenience of the other users of the

highways and would have interfered unreasonably with the public use of the highways, would have constituted an undue burden on the highways, and would have endangered weak bridges on some of them, denial of the application was proper (*Wald Transfer & Storage Co.* v. *Smith*, 290 U. S. 596, 78 L. Ed. 524, modified on rehearing, 290 U. S. 602, 78 L. Ed. 528). Basically the same, is *McDonald* v. *Thompson*, 305 U. S. 263, 83 L. Ed. 168, holding the common motor carrier's actual operations not to have been "*bona fide*" subsequent to the state Railroad Commission's denial of the carrier's application rested on the ground that the proposed operations would have subjected the highways to *excessive burdens* and *would have endangered and interfered with ordinary use by the public*, and where—as is shown by the opinion in the Court below (*Thompson* v. *McDonald*, 95 Fed. (2d) 937, 941)—the state Commission *waived* statutory provisions requiring the carrier to establish *public convenience and necessity*, in which latter aspect the case is within the rule of *Clark* v. Poor, *supra*. It is competent for the state to require the carrier to furnish *insurance policies*, or a surety bond, for the protection of third persons who may be injured or damaged by the proposed operations (*Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 76 L. Ed. 1155; *Hicklin* v. *Coney*, 290 U. S. 169, 78 L. Ed. 247). The state may impose reasonable limits upon drivers' hours of continuous service (*Welch Co.* v. *New Hampshire*, 306 U. S. 79). The state may prescribe *maximum loads* (*Morris* v. *Duby*, 274 U.

S. 135, 71 L. Ed. 966; *Sproles* v. *Binford*, 286 U. S. 374, 76 L. Ed. 1167; *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734); similarly, may limit the *width of vehicles* (*South Carolina State Highway Dept.* v. *Barnwell Bros., supra*). The state may exact *fair compensation* from the interstate operator *for the use of the state's highways*, whether based on mileage (*Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 72 L. Ed. 551), or upon *gross ton miles* (*Continental Baking Co.* v. *Woodring, supra*), or upon the *horsepower* of the vehicles (*Kane* v. *New Jersey, supra; Hendrick* v. *Maryland, supra*), manufacturer's rated capacities (*Dixie Ohio Express Co.* v. *State Revenue Comm.*, 306 U. S. 72), or by *units*, as by exacting a *fixed fee* for each vehicle transported for sale (*Morf* v. *Bingaman*, 298 U. S. 407, 80 L. Ed. 1245), or based upon the *carrying capacity* of the vehicles (*Hicklin* v. *Coney, supra*) or based on the kind of use (*Clark* v. *Paul Gray, Inc.*, —— U. S. ——, decided April 17, 1939), and the state may exact reasonable fees *to defray the expenses* of the department charged with the inspection and regulation of motor vehicles (*Kane* v. *New Jersey, supra; Clark* v. *Paul Gray, Inc., supra*), but not excessive fees (*Ingels* v. *Morf*, 300 U. S. 290, 81 L. Ed. 653).

Nothing in the Control Law's provisions warrants interpreting that act to be a measure designed to regulate the use of the highways and thus to be within the scope of the rule of the distinguishable cases of the third category. And if such legislative purpose were

to be ascribed to the Control Law, the act thereby would be rendered void under Kentucky Constitution, Sec. 51:

> "Law Shall Relate to One Subject; Title; Amendment.—*No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title,* and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended, or conferred, shall be re-enacted and published at length." (Italics ours.)

In obedience to this Constitutional mandate, Kentucky Statutes relating to more than one subject, or to a subject unexpressed in the title, consistently have been held void by the Court of Appeals of Kentucky. (*Hind* v. *Rice,* 10 Bush, 528; *Jones* v. *Thompson,* 12 Bush 394; *Wiemer* v. *Commissioners of Sinking Fund,* 124 Ky. 377, 99 S. W. 242; *Board of Trustees* v. *Tate,* 155 Ky. 296, 159 S. W. 777; *Thompson* v. *Comm.,* 159 Ky. 8, 166 S. W. 623; *Wood* v. *Comm.,* 225 Ky. 294, 8 S. W. (2d) 428; *City of Owensboro* v. *Hazel,* 229 Ky. 752, 17 S. W. (2d) 1031; *Loveless* v. *Comm.,* 241 Ky. 82, 43 S. W. (2d) 348. The Control Law's title showing the Act to be devoted to regulation of manufacture and sale of intoxicants, is set forth in the bill (R. 10, 11). Nothing in the title indicates the Act to have the separate and alien purpose of regulating use of Kentucky's highways. Under the Kentucky Constitution the Control Law cannot relate to a second subject entirely divorced from control of the liquor business, such as protection of highways. Consequently, unless its

substantive provisions imperatively so require—and they do not—the Control Law should not be interpreted to pertain to regulation of the use of highways. However, if the Control Law's substantive provisions be deemed to represent an effort to regulate the use of the highways, then the Act is invalid for the additional reasons that it (a) relates to *two* subjects, (b) only one of which is expressed in the title, and thereby—and in two particulars—offends Section 51 of the Kentucky Constitution. It would be competent for the Court to pronounce against the Control Law's validity on that ground, independently of the Federal questions. (*Greene* v. *Louisville & I. R. R. Co.*, 244 U. S. 499, 61 L. Ed. 1280; *Glenn* v. *Field Packing Company*, 290 U. S. 177, 78 L. Ed. 252). However, the ordinary rule of interpretation requires that where possible a statute be construed in such manner as not to render it unconstitutional. (*Fischer* v. *Grieb*, 272 Ky. 166; *Wadley, etc., R. Co.* v. *Georgia*, 235 U. S. 651, 59 L. Ed. 405.) So construing the Control Law, it must be held to have no relation whatever to the conservation or regulation of the use of highways traversing Kentucky.

We concede the mentioned effect and implication of the distinguishable cases of the third category. However, the decisions therein probably roughly mark and define the boundaries of the States' powers with respect to the regulation of interstate carriers, for, on the other side of the dividing line, we find that a State's admitted power over corporations, ample though it is, does not include the right to exclude a corporation from engaging in interstate commerce within its territorial

confines, as the Control Law assumes to do (*The Pullman Co.* v. *Kansas*, 216 U. S. 56, 54 L. Ed. 378; *L. & N. R. R. Company* v. *Eubank*, 184 U. S. 27, 46 L. Ed. 416); prohibiting a single interstate carrier from conducting its business—as the Control Law undertakes to do—constitutes a direct, substantial and prohibited burden upon, and interference with, interstate commerce (*L. & N. R. R. Co.* v. *Eubank, supra*); neither the State, nor a municipal subdivision thereof, may exact an occupation tax for the privilege of transacting interstate business (*Barrett* v. *New York*, 232 U. S. 14, 58 L. Ed. 483; *Sprout* v. *South Bend*, 277 U. S. 163, 72 L. Ed. 833; *Interstate Transit Co.* v. *Lindsey*, 283 U. S. 183, 75 L. Ed. 953; *Dixie Ohio Express Co.* v. *State Revenue Comm., supra*), and because the same is a direct burden upon interstate commerce, a State may not impose a license tax of $25.00 upon a motor carrier—as a "distributor" of gasoline, by statutory definition—which fills its trucks' tanks with gasoline in a sister State, and in conducting its interstate operations traverses the taxing State, consuming the gasoline as fuel the while. (*Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626, 80 L. Ed. 928.)

The case at bar does not fall within the categories of the three distinguishable types of cases cited, because liquor—*in export*—is not, *ipso facto*, contraband, and is entitled to the protection of the Commerce Clause, and furthermore, because the Control Law's attempted ouster of plaintiff is not a reasonable, non-discriminatory regulation, causing only incidental and remote interference with interstate commerce, imposed in the

absence of Congressional action, but, on the contrary, assumes to impose a positive and complete prohibition upon the plaintiff as a contract carrier and thus undertakes to obstruct operation of an instrument of interstate commerce operating under the sanction of the Interstate Commerce Commission, to which Commission Congress, by legislation occupying the field, exclusively confided the regulation of such carriers. If a state may not exact of an interstate motor carrier payment of a license tax for the privilege of doing business —and cases previously cited show that a state positively may not do so—then *a fortiori,* it would be startling to find that Kentucky may prohibit plaintiff from continuing to conduct its business in its character of contract carrier. The attempted ban of the Control Law is a more direct and substantial interference than were the interferences involved and condemned in *Barrett* v. *New York, Sprout* v. *South Bend, and Bingaman* v. *Golden Eagle Western Lines, supra.* The case at bar is a stronger case than those. Decisions later cited, rested upon the suggested principle, and upon their facts bearing close resemblance to the case at bar, unequivocally hold the Control Law's ban to be ineffectual and void.

(C) In Export, Intoxicating Liquor Is a Legitimate Subject of Interstate Commerce, and Is Protected by the Commerce Clause.

To the simplest transaction of interstate commerce there obviously are two aspects—exportation from State A. and importation into State B. Prior to the enactment of the *Wilson Act*, the *Webb-Kenyon Act*, and the adoption of the *21st Amendment* (App. 37, 38), the powers of the National Government, and the *limitations* upon the powers of the states, were identical with respect both to the importation and exportation of intoxicating liquors. By that Federal legislation and the Constitutional Amendment, the states' regulatory powers have been *created* with respect to *imports*, but with respect to *imports alone*. By inherent expression, those Federal laws are restricted to importation, and *exportation in nowise has been affected thereby. So far as exportation is concerned, the original limitations upon the state's regulatory powers persist.*

As would be expected, the states' regulatory efforts have been addressed chiefly to the prevention of importation of liquor. It is only recently that states have attempted to control exports of intoxicants otherwise than by attempting (unsuccessfully) to impose a license tax thereon. The consequence is that almost all of the Federal cases heretofore adjudicated involve questions of attempted state regulation of importation. However, cases involving imports which arose prior to and in the absence of the enactment of the previ-

ously mentioned Federal legislation, presently constitute authority with respect to exports, because the Constitution speaks neither of "exports" nor "imports," but speaks of "commerce among the several states," and insofar as exports now are concerned the situation presently existing is identical with that formerly existing with respect to imports and exports, indifferently. It would seem plain that if prior to the enactment of the mentioned Federal legislation and the adoption of the 21st Amendment, the states were powerless to regulate interstate imports of liquors, then despite the enactment of that legislation and the adoption of the Amendment (the operative effect of which is limited to imports) the states continue powerless to regulate exports of liquors in interstate commerce.

Unlike the unsound citrus fruits and decaying animal carcasses involved in *Sligh* v. *Kirkwood* and *Clason* v. *Indiana* (*ante,* p. 25), prior to the enactment of the mentioned Federal legislation (and exclusive, of course, of the period of National Prohibition), intoxicating liquors, imported into "dry" territory invariably were held to be legitimate subjects of interstate commerce and to be protected by the Commerce Clause, as against attempts of the states to prohibit, to directly burden, or to regulate, interstate commerce therein. Insofar as protection under the Commerce Clause was concerned, no distinction whatever was drawn between shipments of intoxicating liquors and shipments of wheat, beef or pig-iron, all being legitimate articles of trade. As was said in

WILKERSON v. RAHRER,
140 U. S. 545, 35 L. Ed. 572.

"Unquestionably, fermented, distilled or other *intoxicating liquors* or liquids *are subjects of commercial intercourse,* exchange, barter and traffic, between nation and nation, *between State and State, like any other commodity in which a right of traffic exists,* and are so recognized by the usages of the commercial world; *the laws of Congress and the decisions of courts.*" (Italics ours.)

Equivalent expressions concerning intoxicants are to be found in *Leisy* v. *Hardin,* 135 U. S. 100, 34 L. Ed. 128; *Vance* v. *W. A. Vandercook Co.,* 170 U. S. 438, 42 L. Ed. 1100; *Adams Express Co.* v. *Ky.,* 214 U. S. 218, 53 L. Ed. 972; *L. & N. R. R. Co.* v. *F. W. Cook Brewing Co.,* 223 U. S. 70, 56 L. Ed. 355; and *Rosenberger* v. *Pac. Express Co.,* 241 U. S. 48, 60 L. Ed. 880, and that such is the rule is implicit in the decisions in *Bowman* v. *Chicago, Etc., R. R. Co.,* 125 U. S. 465, 31 L. Ed. 709; *Rhodes* v. *Ia.,* 170 U. S. 412, 42 L. Ed. 1088; *American Express Co.* v. *Iowa,* 196 U. S. 133, 49 L. Ed. 417; *Adams Express Co.* v. *Ia.,* 196 U. S. 147, 49 L. Ed. 424; *Kirmeyer* v. *Kansas,* 236 U. S. 568, 59 L. Ed. 721; *Adams Express Co.* v. *Ky.,* 206 U. S. 129, 51 L. Ed. 987. In all of these cases state statutes—purportedly enacted in the exercise of the *police power*—assuming to prohibit or to regulate *imports* of intoxicants, were held void because in conflict with the commerce powers of the Nation. It was these cases which caused the enactment of legislation of the type of the Wilson Act and

Webb-Kenyon Act, without which the states were powerless to regulate imports.

The same rule has been applied with respect to *exports.*

HEYMAN v. HAYS,
236 U. S. 178, 59 L. Ed. 527.

State and County privilege taxes of Tennessee, sought to be imposed upon a wholesale liquor dealer who had on hand in the state a stock of liquors, and who sold the same by mail orders solicited from persons in other states and by delivering the merchandise to a carrier for through transportation *out of* Tennessee, were held unconstitutional as burdens on interstate commerce. In so deciding that such export traffic could not be burdened, and in repelling the offered technical objection that the carrier being the agent of the customer, the sale was consummated in Tennessee upon delivery to the carrier, and that thus the business was not interstate commerce but strictly Tennessee business and therefore subject to taxation, the Court answered that in determining the character of a particular transaction, substance, rather than form, controls.

Inasmuch as prior to the enactment of the mentioned Federal legislation intoxicants were legitimate articles of interstate trade and commerce, and under the Commerce Clause a state could not regulate either the importation or exportation thereof in interstate commerce, then presently, and despite existing Federal legislation conferring authority upon the states to regulate importation and despite the adoption of the 21st Amendment, likewise restricted in operative effect to

imports, interstate exports of intoxicants remain legitimate articles of commerce and a state cannot prohibit or regulate the exportation thereof in interstate commerce. The result is that the case at bar is in no sense novel in that the business in question consists in transporting exports of liquors from Kentucky in interstate commerce, and it is no more competent for Kentucky to prohibit Ziffrin, Inc., from transporting such exports of Kentucky whiskies than it was for Tennessee to exact a privilege tax from Heyman (*Heyman* v. *Hays, supra*) or for Michigan to prohibit Duke, another contract carrier, from transporting exports of automobile bodies from Detroit to Toledo (*Mich. Pub. Util. Comm.* v. *Duke*, 266 U. S. 570, 69 L. Ed. 445, *infra*, p. 44).

The District Court below was not justified in taking the position—as it did—that *exports* of liquor in interstate commerce are not entitled to the same protection accorded other lawful commodities (*Opinion, constituted Conclusions of Law;* R. 67; 60, 61). If we err in this view, then admittedly the commerce power cases cited in succeeding sections of this brief, dealing—as they do—with transportation of legitimate commodities, generally, are not in point, and our Commerce Clause contentions are not well taken, although appellant's challenges under the 14th Amendment would remain. On the other hand, if our reading of the cases is correct, and if in interstate commerce no distinction properly is to be drawn between exports of whiskey and exports of natural gas, automobile bodies, and other lawful subjects of trade, then the commerce

power cases cited in the next succeeding section of this brief conclusively demonstrate the unconstitutionality of the Control Law in application to plaintiff and its business.

(D) The Control Law Conflicts With the Commerce Clause.

In assuming to prohibit plaintiff from continuing to engage, in its character of contract carrier, in its business of transporting intoxicating liquors from Kentucky, *exclusively in export and exclusively in interstate commerce,* the Control Law constitutes a direct and substantial interference with interstate commerce, conflicts with the commerce powers of the National Government and is, therefore, void.

It previously has been stated that plaintiff's business here involved consists exclusively in transporting export cargoes of intoxicating liquors from Louisville, Ky., and immediate environs, to Indianapolis and Chicago, and to other points lying north of the Ohio River (*ante,* pp. 7, 8) that plaintiff applied for and was denied a liquor Transporter's License because it had been denied a Common Carrier's Certificate of public convenience and necessity, and that plaintiff applied for and was denied that Certificate because plaintiff openly acknowledged itself to be, and is, a *contract carrier* of freight and not a common carrier of freight. The provisions of the Kentucky statutes pertaining to these features of the case deserve close examination.

The *Control Law* provides, *Section 89* (App. 10), that no person except a railroad company, or a railway express company, or a *holder of a license authorized by Section 18* of the Control Law shall transport distilled spirits, or cause the same to be transported. *Section 18* of the *Control Law* makes provision for a variety of licenses for distillers, rectifiers, vintners, wholesalers and retailers. For none of these licenses is plaintiff, or any other motor carrier, eligible. However, in *sub-paragraph 7 of Section 18*, the *Control Law* provides for a "*License to transport distilled spirits and wine to or from any point in Kentucky, the fee for which shall be $10.00 per annum*" (App. 5). This is the liquor *Transporter's License* hereinbefore mentioned, and is the only license for which any motor carrier is eligible. The Control Law, *Sec. 54, subparag. 7* (App. 10)—fusing its regulations with those of the *Motor Vehicle Transportation Act*—provides that *the Transporter's License shall be issued only to persons who are authorized by proper certificate from the Kentucky Division of Motor Transportation to engage in the business of a common carrier. It is this subsection of the Control Law which integrates, and incorporates by reference, the provisions of the Kentucky Motor Vehicle Transportation Act which govern the issuance of certificates of convenience and necessity to common carriers by motor vehicles. The Control Law, by reference, thus imposes as eligibility qualifications for the recipient of a liquor Transporter's License all of the eligibility qualifications required of a com-*

mon carrier under the Kentucky Motor Vehicle Transportation Act.

In *Sec. 52, the Control Law* (App. 8) provides that it shall be a criminal offense for any person to transport intoxicating liquors without first having paid the license tax required by the Control Law and without first having obtained the license required thereby. *Sec. 94* (App. 10) provides that any person who, by himself or acting through another, directly or indirectly, violates the provisions of *Sec. 52* shall be deemed guilty of a crime, and upon conviction shall be punished by a fine of not less than $100.00 and not to exceed $5,000.00, or by imprisonment not to exceed 5 years, or by both such fine and imprisonment; that for a second and each subsequent offense the offender upon conviction shall be fined not less than $500.00 and not exceeding *$10,000.00,* or imprisoned not exceeding *10 years, or both* so fined and imprisoned, and further provides that if the offender be a corporation, then the principal officer, and the officers responsible for such violation, may be punished by such imprisonment. *Sec. 53,* in *sub-parags. 2 and 6,* declares liquors in the possession of any person not entitled to possession of the same conformably with the provisions of the Control Law, and any motor vehicle in which any person is illegally possessing or illegally transporting alcoholic beverages, to be contraband, and in its concluding paragraph further provides for the seizure, without warrant, of contraband, and for the condemnation and confiscation thereof (App. 9, 10).

The funicular language of the *Control Law, Sec. 54, subparag. 7*—providing that a *Transporter's License* shall be issued only to a motor carrier holding the *proper certificate from the Division of Motor Transportation to engage in the business of a common carrier*—makes integral parts of the Control Law, certain provisions of the Kentucky *Motor Vehicle Transportation Act* to the following effect:

Ky. Stats., Sec. 2739j-42, sub-secs. "c" "d" and "f," (App. 13, 14), defines a *common carrier* to be the operator of a motor vehicle for hire *in common carriage,* and a *contract carrier to be any operator* of a motor vehicle for hire *other than a common carrier,* and it defines the "Certificate" to be the certificate of public convenience and necessity authorized to be issued under the Transportation Act. In order to secure and retain the certificate of public convenience and necessity, the motor carrier—

(a) *must be a common carrier,* that is, engaged for hire, in common carriage to an extent adequate to serve the needs of the public (*Ky. Stats., Sec. 2739j-Sub-secs. 42, 50, 51 and 57;* App. 13, 15, 16, 17);

(b) *must obtain a certificate of public convenience and necessity,* upon sworn application filed and upon payment of fee, after notice to competing carriers, over their protests, if any, upon production of requisite proof and after hearing, and upon establishing to the satisfaction of the Division of Motor Transportation that the operation for which authorization is sought by the applicant is convenient and necessary in the public interest, that applicant possesses facilities where-

with efficiently to perform the service, and that the proposed operation will not prove detrimental to the public transportation business of other carriers of every character within the territory sought to be served by the applicant (*Ky. Stats., Sec. 2739j., Sub-secs. 45 to 51, inclusive;* App. 14-17; *Reorganization Act,* App. 21, 22); and

(c) having obtained the common carrier's certificate, the carrier must adhere to the rates specified in its filed schedule (*Ky. Stats., Sec. 2739j-59,* App. 17) and *must submit to state regulation* and modification of *its rates, charges and services* (*Ky. Stats., Sec. 2739j-61;* App. 18).

Thus, the Control Law encapsulates the Motor Vehicle Transportation Act, and in order to render itself eligible to obtain the indispensable liquor Transporter's License, plaintiff, Ziffrin, Inc., needs must acquire and hold a common carrier's Certificate, which, under the Transportation Act, plaintiff may secure *only if plaintiff converts its business from that of a contract carrier into that of a common carrier,* and thereby assumes and incurs the additional burdens and greater liabilities appertaining to common carriers provided both by statutory enactments and by the common law—among others, that the plaintiff hold itself out to the general public to carry for the public without discrimination at reasonable and regulated rates, that plaintiff provide adequate service for the general public in the carriage of all varieties of freight, and that plaintiff assume the strict liability of a common carrier for the safe delivery of freight entrusted to it. Moreover, plaintiff must es-

tablish—to the satisfaction of Kentucky officials—that it possesses the facilities and equipment requisite for such expanded operations, that its proposed operations are necessary and convenient in the public interest and will not prove detrimental to the business of any other carrier whatsoever, and plaintiff must agree to submit to regulation and modification of its charges and services.

The decree appealed from herein holds that Kentucky may make those exactions of this appellant. In so determining, the decree below is inconsistent with (a) the rule of *Heyman* v. *Hays*, (*ante*, p. 37), (b) the rule established by the long, unbroken line of cases—of which *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. Ed. 649; *Western Union Teleg. Co.* v. *Kansas*, 216 U. S. 1, 54 L. Ed. 355, and *Barrett* v. *New York*, 232 U. S. 14, 58 L. Ed. 483, are typical—holding that a state may not require a *license* for conducting interstate commerce, as the Control Law attempts to do by requiring a liquor Transporter's License of interstate operators; and (c) the rule of the four cases next cited, which hold that a state cannot make such exactions as the Control Law proposes, and that an attempt to do so is a direct, substantial and prohibited interference with, and burden upon, interstate commerce.

MICHIGAN PUBLIC UTILITIES COMMISSION v. DUKE (1925), 266 U. S. 570, 69 L. Ed. 445.

The plaintiff, Duke, a *contract carrier* by motor vehicle, was engaged exclusively in conducting the busi-

ness covered by three contracts which he held for transporting, from Detroit, Mich., to Toledo, O., the automobile bodies made at the plants of three body manufacturers in Detroit and intended for the use of an automobile manufacturer at Toledo. Plaintiff sought to enjoin Michigan authorities from enforcing against him a Michigan statute which denied plaintiff the right to conduct his business as a contract carrier and which required him, in the event of continuance of the business, to qualify as a *common carrier* (which though not mentioned, doubtless would have entailed showing public convenience and necessity). *Observing that compliance with the Michigan statute would have compelled Duke to serve the general public without discrimination and for a reasonable payment, and would have prevented Duke from using his trucks exclusively to perform his contracts,* the Court determined that the Michigan statute constituted a direct and substantial burden upon interstate commerce, and, therefore, was unconstitutional. Speaking of the requirements of the Michigan statute, which were equivalent to those imposed by the Kentucky *Control Law* and the Kentucky *Motor Vehicle Transportation Act linked* therewith, the Court said:

> "And it is a burden upon interstate commerce to impose on plaintiff the onerous duties and strict liability of common carrier * * *.
>
> "Clearly, these requirements have no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of highways. *The police*

power does not extend so far. It must be held that, *if applied to plaintiff and his business, the act would violate the commerce clause of the Constitution.*" (Italics ours.)

BUCK v. KUYKENDALL (1925),
267 U. S. 307, 69 L. Ed. 623.

Buck, a citizen of Washington, who desired to operate an automobile bus line over a Federal Aid Highway between Seattle, Wash., and Portland, Ore., applied for and obtained from the State of Oregon the license prescribed by its laws. He then applied to the State of Washington for the prescribed certificate of public convenience and necessity required by its statutes, and was refused, on the ground that adequate transportation facilities already were available. To enjoin interference by Washington officials with the operation of the projected line, Buck brought this suit against Washington's Director of Public Works. In reversing the judgment of the Court below dismissing the bill, this Court held that the State of Washington could not exact a showing of *public convenience and necessity, because the determination of that question was peculiarly within the province of the National Government,* and that the State's attempt to determine that question constituted an interdicted interference with interstate commerce.

A pertinent portion of the opinion, analyzing the nature and effect of the Washington statute, reads:

"Moreover, it determines whether the prohibition shall be applied by resort, through state of-

ficials, to *a test which is peculiarly within the province of Federal action—the existence of adequate facilities for conducting interstate commerce.* The vice of the legislation is dramatically exposed by the fact that the State of Oregon had issued its certificate, which may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, *the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause.* It also defeats the purpose of Congress expressed in the legislation giving *Federal aid* for the construction of interstate highways." (Italics ours.)

BUSH & SONS CO. v. MALOY (1925),
267 U. S. 317, 69 L. Ed. 627.

A Maryland statute prohibited common carriers of freight by motor vehicles from using the state's public highways without a *certificate of convenience and necessity* having been granted by the state Public Service Commission. The Commission, in the exercise of the discretionary powers vested in it, had denied the plaintiff's application for a certificate to do an exclusively interstate business because the Commission concluded *existing carriers' businesses would be harmed by the proposed operation.* Although use of a Federal Aid Highway was not involved, the Court held the case to be indistinguishable from *Buck* v. *Kuykendall, supra,*

and on writ of error to the Maryland Court of Appeals, reversed its judgment which affirmed the trial court's judgment dismissing the bill which sought to enjoin interference by Maryland officials with the use of plaintiff's vehicles upon the highways. The Supreme Court explained that the Maryland statute, and that State's officials' actions thereunder, were unconstitutional—

> "* * * because the statute, as construed and applied, *invaded a field reserved by the commerce clause for Federal regulation.*" (Italics ours.)

Thus, *three times in a single year, 1925, and in the absence of such legislation as now is embodied in Motor Carrier Act, 1935,* the Court held that it is incompetent for a state to exact a certificate of convenience and necessity from an interstate motor carrier. Five years later, *and still five years prior to the enactment of Motor Carrier Act, 1935,* in the fourth case,

ALLEN v. GALVESTON TRUCK LINE CORP. (1930), 289 U. S. 708, 77 L. Ed. 1463,

the Court, in affirming the decree appealed from in *Galveston Truck Line Corp.* v. *Allen,* 2 Fed. Supp. 488, adhered to the rule laid down in its three decisions of 1925.

The Texas Railroad Commission had granted the applicant truck line, again a *contract carrier,* a permit to operate trucks in interstate commerce into and out of Texas, but had *denied applicant a permit to engage in interstate commerce wholly within the State of*

Texas as a connecting link in interstate commerce, justifying its denial of the permit on the grounds that the territory sought to be served by the applicant already was adequately served by common carriers, and that grant of the certificate would have been detrimental to the businesses of such operating carriers. For the fourth time this Court held that it is incompetent for the state to saddle upon an interstate motor carrier —and particularly, a contract carrier——the burden of showing public convenience and necessity for its operations, and upon consideration of that factor, or element, to deny an interstate motor carrier the right to pursue its business. The Court accordingly affirmed the decree below, which enjoined the members of the Railroad Commission and other state law enforcement officials from interfering with the plaintiff in the operation of its trucks over the highways of Texas in interstate commerce.

Two of the preceding four cases involved common carriers, and two of them involved contract carriers. Three of the cases were decided in 1925 and one in 1930. Thus, all were decided long before Congress enacted Motor Carrier Act, 1935. Thus, each of the four cases shows regulations and requirements of the character in question to be not matters of mere local concern, but to be matters of National concern, and each of the cases further shows that such refusal of permission to inaugurate, or to continue to engage in, such interstate operations is a direct and substantial interference with interstate commerce, and not a mere in-

direct, remote or incidental interference therewith. There having been no act of Congress occupying the field at the time these four cases were determined, had the Court considered compulsory conversion from contract to common carrier or a requirement of obtention of a certificate of public convenience and necessity to represent only an indirect and incidental burden, and the matters to be only of local concern, the Court would have invoked and followed the doctrine of *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412, and of the distinguishable motor carrier cases earlier mentioned, *ante*, pp. 27-29. The determinations made in the four cases cited show that interferences of the precise character involved in the case at bar are direct and substantial, of National concern, and void even in the absence of congressional action, because of the self-executing character of the Commerce Clause in application to direct and substantial interferences in matters of National concern.

The Control Law essays too much. The cases cited in this section show that the specially constituted Court below *erred in its Conclusions of Law* to the effect that the Control Law (1) in requiring a Transporter's License for interstate export operations, (2) in specifying compulsory metamorphosis from "contract" to "common" carrier, and (3) in requiring winning of certificate of public convenience and necessity, in application to the plaintiff, and its interstate export business, (a) only remotely and incidentally affects interstate commerce; (b) does not con-

stitute a direct or substantial interference with interstate commerce in a matter of National concern; and (c) that the regulations do not contravene the Commerce Clause (R. 48-62). The cases show, further, that the Court below erred in dissolving the temporary restraining order, in overruling plaintiff's motion for a preliminary injunction, and in dismissing the complaint as amended, and that appellant's assignment of errors in the particulars mentioned, being Assignment of Errors and Statement of Points designated by corresponding symbols, "1," "2," "3," and "4," subparagraphs "a," "b," and "c" (R. 73-75; 79-80) are well taken.

(E) Acts of Congress Occupy the Field of Regulation, the Control Law Conflicts Therewith, and Is Void.

The rationale of the four decisions discussed in the preceding section of this brief is such that the Control Law properly would be deemed unconstitutional in the absence of congressional legislation occupying the field of regulation. However, in 1935, subsequent to the decision of those four cases, Congress enacted *"Motor Carrier Act, 1935"* (App. 22), which completely occupies the field and excludes conflicting state regulation of the same subject matter. The Federal Act occupies the entire field of regulation in each and all of the particulars presented in the case at bar. The field thus having been pre-empted by Congressional action, the conflicting state action, represented

by the Control Law, is inhibited, superseded, and rendered void.

Congress expressly declared *Motor Carrier Act, 1935,* U. S. C. A., Title 49, *Sec. 302,* to have been enacted to develop and preserve *a highway transportation system properly adapted to the needs* (a) of the *Nation's commerce,* and (b) of *National defense.* Congress avowed it to be its policy and purpose by the Act to regulate interstate transportation by motor carriers (App. 22, 23). The Act, U. S. C., Title 49, Sec. *302 b,* provides that it shall apply to transportation of *"property"* by motor carriers engaged in interstate commerce, and to the regulation of such transportation, control of which matters is vested in the Interstate Commerce Commission (App. 23), and such control thereby certainly is denied the states. In stating that the Act shall apply to the transportation of *"property,"* Congress used a word of the broadest import and connotation. Significant, is the single, chosen word's catholicity. Nothing in the case at bar requires the Court to determine whether the word *"property,"* as used in the Act, includes commodities which are not the subjects of legitimate trade and commerce, such as the unsound citrus fruits and decaying animal carcasses involved in *Sligh* v. *Kirkwood* and *Clason* v. *Indiana, supra,* but the word "property" as used in the Act—with the exceptions enumerated in the Act itself—certainly includes all legitimate subjects of interstate commerce, including intoxicating liquors in export (*ante,* pp. 34-39). The

numerous, detailed *exceptions* of certain operations from the purview of the Act, prescribed by its own terms, are themselves significant. So excepted are: motor vehicles employed solely in transporting school children and teachers to and from school, taxicabs, hotel busses, motor vehicles operated under the supervision of the Secretary of Interior for the purpose of transporting persons in and about the National Parks and National monuments, motor vehicles operated by farmers and used in the transportation of agricultural commodities or supplies, motor vehicles operated by cooperative associations, trolley busses, motor vehicles used in carrying live stock, fish or raw agricultural commodities, motor vehicles used exclusively in the distribution of newspapers, motor vehicles used in the transportation of persons or property incidental to transportation by aircraft, and motor vehicles used in the transportation of passengers or property wholly within a municipality or between contiguous municipalities, and casual operations (*U. S. C., Title 49, Sec. 303, Subsec. 21b;* App. 26, 27). But out of the sweeping grant to the Interstate Commerce Commission of control over motor carriers transporting "property," *Congress carved no exception pertaining to carriers of intoxicating liquors.* The rule, *expressio unius est exclusio alterius,* would seem applicable in the face of these detailed exceptions which do not include mention of transportation of intoxicating liquors in export. Clearly, all "property," all lawful subjects of commerce (with the exceptions prescribed by the Act's own terms) are subject to the Act's pro-

visions, and the field of regulation is completely and exclusively occupied by the Act to the extent indicated.

The Federal Act, *U. S. C., Title 49, Secs. 303, Subsecs. 14-16; 306; 309,* authorizes operations by both common carriers and contract carriers by motor vehicle (App. 25, 28, 29, 31, 32), provides for the issuance of certificates of convenience and necessity for the former (*U. S. C., Title 49, Sec. 307;* App. 30), and for the issuance of permits to the latter (*U. S. C., Title 49, Sec. 309b;* App. 31, 32). Regulation of common carriers and contract carriers alike, is delegated to the Interstate Commerce Commission (*U. S. C. Title 49, Sec. 304;* App. 28).

We previously have invited the Court's attention to the fact that plaintiff has been operating as an interstate contract carrier of property pursuant to its compliance with the provisions of the Motor Carrier Act, 1935, and with the sanction of the Interstate Commerce Commission (*ante,* p. 5). In the face of the broad scope of this Act of Congress, and in view of the fact that the plaintiff has duly qualified to operate thereunder, it would seem clear that it is not competent for the State of Kentucky to forbid plaintiff to continue to engage in its mentioned business as a contract carrier of exports or for Kentucky to impose as conditions for the exercise of that right that plaintiff transform itself into a common carrier and obtain a certificate of convenience and necessity from Kentucky authorities. Nevertheless, the Three Judge Court below has held that Kentucky may do so.

Motor Carrier Act, 1935, authorizes contract carriers to transport "property." Whiskey is "property."

The License Cases (Thurlow v. Mass.), 5 How. 504, 12 L. Ed. 256.

"But spirits and *distilled liquors are universally admitted to be* subjects of ownership and *property* and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of *property* exists." (Italics ours.)

No reason appears for giving the word *"property,"* as used in Motor Carrier Act, 1935, a more restricted meaning than was given it in the Act of Congress involved in *Bowman* v. *Chicago & N. W. R. R. Co., ante,* p. 36, and quoted in the opinion therein:

"Every railroad company * * * is hereby authorized to carry * * * all passengers, troops, government supplies, mails, freight and *property* on their way from any State to another State, and to receive compensation therefor." (Italics ours.)

The opinion in the *Bowman case* took cognizance of other Federal acts regulating the transportation of *high explosives,* and which acts further expressly provided that their enactment should not be construed to prevent the states from regulating or prohibiting traffic in, or transportation of, explosives between persons or places lying or being within their territorial limits. Speaking of these Acts of Congress, the Court said:

"So far as these regulations made by Congress extend *they are certainly indications of its inten-*

tion that the transportation of commodities between the states shall be free, except where it is positively restricted by Congress itself, or by the states in particular cases by the express permission of Congress." (Italics ours.)

The exception of explosives is analogous to the exceptions provided by Motor Carrier Act, 1935 (*ante*, p. 53).

The intoxicating liquors involved in the *Bowman case*, tendered to the railroad for shipment, and rejected by it, were held to have been "freight and property" within the meaning of those terms as used in the Act of Congress, which it was the railroad's duty to accept and transport. The word "property" used in the same railroad statute was held to include intoxicating liquors in *Adams Express Co.* v. *Ky.*, 214 U. S. 218, 53 L. Ed. 972, *ante*, p. 36, *infra*, p. 62. Pursuing the reasoning employed in the *Bowman case* and the *Adams Express Co. case*, the intoxicating liquors involved in the case at bar likewise are "property," power to regulate the interstate transportation of which has been reposed by Congress in the Interstate Commerce Commission by the Federal legislation governing interstate motor carriers, subject to an exception with respect to *imports* created by the Webb-Kenyon Act and the 21st Amendment.

Moreover, there is additional Federal legislation, pertaining explicitly to interstate commerce in liquor, impelling to the same conclusion. Like the 21st Amendment, the *Wilson Act*, and the *Webb-Kenyon*

Act (App. 37, 38) concern themselves only with importations into a state contrary to the laws thereof. The *Knox Act*, the *Federal Alcohol Administration Act*, of 1935, and *Liquor Enforcement Act of 1936* (App. 41, 42, 38), however, deal with both imports and *exports*, as is shown, *infra*, pp. 66, 67, 96, 97. We previously have shown that in the absence of any Federal statute upon the subject, and prior to the adoption of the 21st Amendment, both interstate importation and exportation of liquors were deemed to be within the commerce powers of the Nation, to be free, and not to be subject to state regulation or control. By the enactment of the Federal statutes last mentioned and by the adoption of the 21st Amendment, importation into a state contrary to its laws has been restricted, and the states have been authorized to exercise regulatory powers over imports. Nevertheless, *since and despite these changes in the Federal laws, and with the assent of Congress, the status of exportation in interstate commerce has remained unaltered, except with respect to the labeling and packaging requirements* imposed by the *Knox Act* and *Federal Alcohol Administration Act*, and provisions for enforcement made by *Liquor Enforcement Act of 1936* (*infra*, pp. 66, 67, 96, 97). The states remain powerless and impotent to regulate exports of intoxicants in interstate commerce, and it is not needful that Congressional language be found inhibitive of state regulatory action.

SOUTHERN RAILROAD CO. v. REID,
222 U. S. 424, 56 L. Ed. 257.

A judgment of a North Carolina State Court—which enforced a state statute against an interstate railroad by penalizing it for refusal to accept tender of an interstate shipment—was reversed because the statute was in conflict with the Interstate Commerce Act, and therefore void. The railroad had refused to accept the shipment because at the time the same was tendered no through and joint rates had been established with the Interstate Commerce Commission. In holding the mentioned result followed even though no language inhibiting state action was to be found in the Interstate Commerce Act, the Court said:

> "There is scarcely a detail of regulation which is omitted to secure the purpose to which the interstate commerce act is aimed. *It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of.*" (Italic ours.)

It is unimportant that Congress has not expressly forbidden the states to attempt to regulate export traffic in intoxicants. Read in conjunction with the Acts of Congress pertaining to interstate traffic in intoxicating liquors, *Motor Carrier Act, 1935,* authorizes an interstate contract carrier by motor vehicle to transport exports of intoxicants, and in that particular the Control Law is in irreconcilable conflict with the Federal legislation, with the inevitable result well illustrated in

PENNSYLVANIA R. R. CO. v. PUBLIC SERVICE COMM.,
250 U. S. 566, 63 L. Ed. 1142.

A Pennsylvania statute prescribed a 30-inch platform, guard-rails and steps for the end cars of trains, which specifications conflicted with the regulations of the Post Office Department governing the construction and equipment of mail cars when used as end cars, and conflicted, also, with the Interstate Commerce Commission's specifications for caboose cars, constantly used as end cars, without platforms. Being in conflict with the regulations of both the Post Office Department and the specifications of the Interstate Commerce Commission, the Pennsylvania statute was held void, even though it well may have been regarded as imposing only an incidental and indirect burden on interstate commerce.

So potent is the National Government's power over interstate commerce that *the mere manifestation of congressional purpose is sufficient to nullify a state law inconsistent therewith:*

ERIE R. R. CO. v. NEW YORK,
233 U. S. 671, 58 L. Ed. 1149.

In a state Court of New York the defendant interstate railroad company had been convicted, under a New York statute, of having employed, on *November 1, 1907,* a railroad telegrapher more than eight hours in a period of twenty-four hours, such excess in hours having been prohibited and denounced by the state's

statute. The defense urged below and in the Supreme Court was that the New York statute was in conflict with the purpose manifested by Congress by the "Hours of Service Act," approved *March 4, 1907*, which by its terms *was to come into force and effect one year after its passage*, and by which Act, among other things, interstate railroads were authorized to employ railroad telegraphers for nine hours in twenty-four hour periods. *The alleged offense thus had been committed after the enactment of the Federal statute but before it became effective.* The burden imposed by the New York statute probably accurately should be described as only incidental and indirect. Nevertheless, in reversing the judgment of conviction, this Court held the New York statute *invalid* because of the *conflict existing between its terms and the purpose manifested by the Federal statute*, saying:

> "The relative supremacy of the state and national power over interstate commerce need not be commented upon. Where there is conflict, the state legislation must give way. Indeed, *when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the state ceases to exist.*" (Italics ours.)

The same rule was applied and a Washington statute held to have been rendered void by the congressional purpose evinced by the "Hours of Service Act" prior to its effective date, in *Northern Pacific R. R. Co. v. Washington*, 222 U. S. 370, 56 L. Ed. 237.

The Federal sanction and authority accorded Ziffrin, Inc., under and by virtue of its qualification to operate under *Motor Carrier Act, 1935,* and the superiority and supremacy of the right so conferred over any attempted deprivation or limitation thereof by the State of Kentucky, are comparable to the analogous rights conferred by the licenses to engage in the coasting trade presented in *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. Ed. 23, and *Sinnot* v. *Davenport,* 22 How. 227, 16 L. Ed. 243, which license rights the Court held to be inviolable as against the antagonistic regulatory acts of state legislatures. Juridically, the authority to operate in interstate commerce which Ziffrin, Inc., derives under *Motor Carrier Act, 1935,* would appear to be identical with the rights to engage in interstate commerce derived by the owners of vessels enrolled and licensed, under the Act of Congress, to engage in the coasting trade.

Acts of Congress, expressly and by necessary implication, say that plaintiff may engage in the business of transporting exports of liquor from Kentucky in interstate commerce, and that plaintiff may conduct that business in its character of contract carrier. It consequently is incompetent for the State of Kentucky, by the Control Law, to forbid plaintiff to continue to engage in that business or to require plaintiff to convert itself into a common carrier and to show public convenience and necessity for its operations as conditions precedent to continuing so to engage. It is not a sufficient answer to say, as did the Court below, that

the Control Law represents an exercise of Kentucky's police power. *Conservation of natural resources* is a proper object for the exercise of the police power, but state statutes, enacted in the purported exercise of that power, which conflict with the commerce powers of the National Government are unconstitutional (*West* v. *Kansas Natural Gas Company*, 221 U. S. 229, 55 L. Ed. 716; *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 67 L. Ed. 1117, re-affirmed on petition for rehearing, 263 U. S. 350, 67 L. Ed. 1144; *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. Ed. 1027; *Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217, 56 L. Ed. 738; *Peoples Natural Gas Co.* v. *Public Service Comm.*, 270 U. S. 550, 70 L. Ed. 726). The *prevention of fraud* is a recognized object of the exercise of the police power. However, the police power cannot be exercised to prevent fraud if the statute is in opposition to the commerce powers of the National Government (*Real Silk Hosiery Mills, Inc.*, v. *Portland*, 268 U. S. 325, 69 L. Ed. 982; *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 71 L. Ed. 524). *The prevention of furnishing intoxicating liquors to habitual inebriates is a proper subject for the exercise of the police power,* but in 1909 a 1903 Kentucky statute so providing was held invalid in application to quantities of liquor imported from Indiana in interstate commerce by an habitual drunkard, resident of Kentucky (*Adams Express Co.* v. *Ky.*, 214 U. S. 218, 53 L. Ed. 972), the Court saying: "*Liquor, however obnoxious and hurtful it may be in the judgment of many, is a recognized article of com-*

merce." If prior to the enactment of the Webb-Kenyon Act Kentucky was powerless to prevent the Express Company from delivering Indiana liquors to Kentucky inebriates, then it would seem plain that in 1938 Kentucky was impotent to prevent plaintiff, an Indiana corporation, from transporting Kentucky liquors out of the state, into Indiana and Illinois, and far away from Kentucky's inebriates. Moreover, a regulatory statute enacted in the exercise of the police power, *may be valid in application to intrastate transactions and, nevertheless, invalid when in application to interstate transactions* it comes into conflict with the commerce powers of the National Government. A perfect illustration is afforded by the decisions concerning the 1933 New York Milk Control Act, sustained in its intrastate application, as a measure designed to promote the *public health* by assuring a safe and adequate milk supply (*Nebbia* v. *New York*, 291 U. S. 502, 78 L. Ed. 940), but held unconstitutional in its interstate application because deemed a direct burden on interstate commerce (*Baldwin* v. *Seelig*, 294 U. S. 511, 79 L. Ed. 1032). The decisions which rendered nugatory the attempts of states to regulate interstate liquor traffic on the ground that the state laws constituted direct interferences with interstate commerce, are of the same pattern and have been discussed. The identical difference which distinguishes *Baldwin* v. *Seelig* from *Nebbia* v. *New York* likewise distinguishes *Heyman* v. *Hays*, *Bowman* v. *Chicago, Etc., R. R. Co.*, and like cases (*ante*, pp. 36, 37, 55), from the domestic, in-

ternal transaction cases, concerning prohibition of distillation and regulation of retail sales, presented in *The License Cases* (*Thurlow* v. *Massachusetts*), 5 How. 504, 12 L. Ed. 256; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. Ed. 205, and *Kidd* v. *Pearson*, 128 U. S. 1, 32 L. Ed. 346.

Prior to the enactment of *Motor Carrier Act, 1935*, and in lawful control of motor carriers, it was within the competence of the states to make, and within their territorial confines to enforce, reasonable and nondiscriminatory regulations pertaining to matters of *local* concern (as distinguished from matters of *National* concern) only indirectly and incidentally (and not directly or substantially) affecting interstate commerce (*ante*, pp. 24-29). But *Mich. Pub. Util. Comm.* v. *Duke*, *Buck* v. *Kuykendall*, *Bush & Sons Co.* v. *Maloy*, and *Allen* v. *Galveston Truck Line Corporation*, *supra*) all decided prior to the enactment of Motor Carrier Act, 1935—show that even independently of such Congressional action it is incompetent for the states to exclude interstate motor carriers from operation within their borders or to impose upon such carriers laws or regulations constituting substantial burdens upon or direct interferences with their interstate operations, such as conversion of the carrier's business from contract to common carriage, or procurement of certificate of convenience and necessity. Statutory provisions, equivalent to those of the Control Law which prohibit an interstate contract motor carrier from continuing its interstate operations unless it converts

itself into a common carrier and procures a certificate of convenience and necessity, were held unconstitutional prior to, and in the absence of, enactment of Motor Carrier Act, 1935.

However, the plaintiff's position is fortified by the enactment of *Motor Carrier Act, 1935*, by which Congress, in pursuance of the authority vested in it to regulate interstate commerce and to provide for the National Defense, pre-empted the field of permissible regulation. Certainly, at all times subsequent to the enactment of that Act it has not been open to Kentucky to deny to plaintiff the right to conduct its established business of carrying whiskey exports from Kentucky. State regulation, even though it amounts to no more than an incidental and remote interference with interstate commerce, cannot prevail when in conflict with an Act of Congress. Consequently, the regulations embodied in the Control Law must fail even if they incorrectly be regarded as merely incidental and remote interferences, instead of being correctly appraised as the direct and substantial obstructions which they repeatedly have been adjudged to be.

After erroneously stating that Congress—

> "* * * has expressly avoided enacting legislation dealing with the shipping of liquor out of a state as is the case at bar" (R. 55)

and after thrice reiterating the substance of that statement (R. 57, 59), and despite the fact that nothing in the record shows the number of contract car-

riers by motor vehicle operating in Kentucky, and notwithstanding that the matter of the number of such carriers so operating, if pertinent (and it is not), would be one for establishment by both allegation and proof, and is not a matter of which a Court properly may take judicial notice, the Opinion continues:

> "*There are hundreds of independent trucks operating in Kentucky under a contract carrier's license.* They have no schedule, no fixed route, and no definite termini. *It would be an impossibility to determine the quantity or destination,* whether within or *without the state of Kentucky,* if distillers could call a passing truckman and make a private contract for hauling each load of liquor" (R. 60, 61, and *errata page*). (Italics ours.)

This statement of the trial Court not only draws on matters *dehors* the record—and which possibly could not be substantiated by proof—of which excursion plaintiff well may complain, but it also entirely disregards, and in fact contradicts, the provisions of the *Knox Act, Criminal Code, Sec. 240* (App. 41), which denounce as a criminal and punishable offense for any person knowingly to ship, or cause to be shipped, from one state into any other state any package containing intoxicating liquors fit for use for beverage purposes—

> "* * * unless such package be so *labeled* on the outside cover as to plainly show the *name of the consignee,* the *nature of its contents,* and the *quantity* contained therein." (Italics ours.)

The trial Court's statement similarly omits to take cognizance of the elaborate packaging and labeling requirements imposed in 1935 by *Federal Alcohol Administration Act* (App. 42).

Liquor Enforcement Act of 1936, U. S. C., Title 27, Sec. 225 (App. 40), charges the Secretary of the Treasury, and his nominees, with the duty of enforcing the aforementioned provisions of the *Knox Act, Criminal Code, Sec. 240.* Thus Congress has provided that the Secretary of the Treasury and personnel selected to administer *Federal Alcohol Administration Act,* and not the Alcoholic Beverage Control Board of Kentucky, shall see to it that beverage liquors' containers, in export in interstate commerce, shall show the consignments' quantities and destinations, and Federal legislation already requires the specific disclosure the District Court below deemed needful, but which it erroneously considered was not required by Federal statutes and would not exist unless required by Kentucky regulation.

In view of *Motor Carrier Act, 1935, Knox Act, Federal Alcohol Administration Act* and *Liquor Enforcement Act of 1936,* we contend that the District Court below erred in making, and *in applying,* its Conclusions of Law—

(a) That Congress has not legislated with respect to the export transportation of intoxicants in interstate commerce by contract carriers by motor vehicle for hire, and

(b) That National legislation governing and controlling interstate exportation and exports of intoxicants is lacking,

which Conclusions plaintiff has assigned as error (Assignment of Errors, and Statement of Points, indicated "4," subpars. "d" and "e" (R. 75, 80).

(F) In Assuming to Require Plaintiff to Convert Itself into a Common Carrier, the Control Law Deprives Plaintiff of Its Property Without Due Process of Law.

We previously have shown (*ante*, pp. 9, 10, 40) that the Control Law assumes to require plaintiff to hold a Certificate of Convenience and Necessity in order to be eligible to receive a Transporter's License, and that in order to secure the indispensable Certificate of Convenience and Necessity—by the conjugate provisions of the Control Law and the Motor Vehicle Transportation Act—plaintiff must resolve itself into a common carrier. In three motor carrier cases this Court has held that such prescript of transmutation from contract carrier to common carrier is a taking of property without due process. The rule was first laid down in

MICHIGAN PUBLIC UTIL. COMM. v. DUKE,
266 U. S. 570, 69 L. Ed. 445,

the facts in which have been stated earlier (*ante*, p. 44). With respect to *due process*, the Court said, in part:

> "Moreover, *it is beyond the power of the state by legislative fiat to convert property used exclu-*

sively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process clause of the Fourteenth Amendment." (Italics ours.)

FROST TRUCKING CO. v. RAILROAD COMMISSION.
271 U. S. 583, 70 L. Ed. 1101.

A 1919 *amendment* to the 1917 California Truck Transportation Act provided that no *motor carrier* should operate for compensation over the highways of the state *without first having secured from the Railroad Commission a certificate of public convenience and necessity. The amendment assumed to place contract carriers on exactly the same footing as common carriers.* The plaintiffs in error were *contract carriers* engaged, under a single private contract, in transporting citrus fruits over the public highways for compensation. They were brought before the Railroad Commission charged with having violated the Act as amended, in that they had not secured from the Commission the required certificate of public convenience and necessity. The Commission directed the plaintiffs in error to suspend their operations under their contract until they should have secured a certificate of public convenience and necessity, and the Commission's order was upheld by judgment of the State Supreme Court. Thereupon the carrier sought, through

writ of error, to review the judgment of the California Court, which prohibited them from engaging in their mentioned business. So far as the opinion shows, *interstate commerce was not involved.* Certainly, no consideration was given to the case otherwise than under the Fourteenth Amendment.

The Court held the case indistinguishable in principle from *Mich. Pub. Util. Comm.* v. *Duke, supra,* and in holding that the California Act deprived the carrier of its property without due process of law, and in reversing the judgment of the California Court, which had upheld the Railroad Commission's order to cease and desist, this Court said:

> "* * * In other words, the case presented is not that of a private carrier who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier; but *it is that of a private carrier who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the railroad commission.* The certificate of public convenience, required by §5, is exacted of a common carrier and is purely incidental to that status. The requirement does not apply to private carrier *qua* private carrier, but to him only *in his imposed statutory character of common carrier.* Apart from that signification, so far as he is concerned, it does not exist.
>
> "That, consistently with the due process clause of the 14th Amendment, *a private carrier cannot*

be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here. It was expressly so decided in Michigan Pub. Utilities Commission v. Duke, * * *.

"There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; *and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion.* Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. *In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.*

"*It would be a palpable incongruity* to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution,

but *to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.* It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and *one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.* If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. *It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.*" (Italics ours.)

On July 1, 1938, Ziffrin, Inc., like the Frost Trucking Co. almost 20 years earlier, was confronted by the choice described by the Court as that between Scylla and Charybdis.

SMITH v. CAHOON,
283 U. S. 553, 75 L. Ed. 1264.

This case presented a similar situation, and worked out to the same result. The carrier was a private, *or contract carrier,* for hire, engaged exclusively in intrastate business in Florida. The *Florida statutes* regulating automobile transportation companies *undertook to place contract carriers and common carriers on a like footing, and required both types of carriers to obtain*

certificates of public convenience and necessity, to submit to regulation of their services, to accept a prescribed method of keeping accounts, and to open their schedules of rates to the public. The Court held the Act unconstitutional in application to the contract carrier, saying:

> "All carriers within the act, whether public or private, are put by the terms of the statute upon precisely the same footing. All must obtain certificates of public convenience and necessity upon like application and conditions. *It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier,* but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. *Such a scheme of regulation of the business of a private carrier,* such as the appellant, *is manifestly beyond the power of the state.*" (Italics ours.)

The only way in which Ziffrin could secure the requisite Transporter's License was for Ziffrin radically to change the essential nature of its business, to remould itself into a common carrier, and to assume the added burdens, obligations and liabilities imposed by law upon a carrier which has so dedicated its business to public service. The rule established by the three cases last cited is that the attempted extortion by a state of such change in business phase as a statutory *quid pro quo* for the enjoyment of the right to engage in the business of a motor carrier is a violation of the carrier's constitutional rights. Under that rule

the Court below erred in its tacit—but necessarily implied—Conclusion of Law that it is competent for the General Assembly of Kentucky to require plaintiff, by way of conditions precedent to enjoying the privilege of continuing in business, to transform its business from that of a contract carrier into that of a common carrier; to dedicate its property and activities to service of the public indiscriminately, and necessarily to relinquish its existing, hard-won and valuable contracts; to renounce and forfeit—at least to jeopardize—its status as a contract carrier in other states and before the Interstate Commerce Commission; to assume the burdens and liabilities of a common carrier; to establish the existence of public convenience and necessity for its operations; and to submit to regulation and modification, by Kentucky officials, of its services, and charges therefor. The settled rule is that a state's demand that a contract carrier surrender so much, or quit business, constitutes a proscribed taking of the carrier's property without due process of law. In such case it is the expression of an untenable viewpoint to say that the Control Law represents a valid and reasonable regulation within the orbit of the proper exercise of the police power (R. 52, 62). The three cases last cited show, we believe, that the Control Law is palpably arbitrary and patently in excess of recognized state legislative power, that it assumes to take plaintiff's property without due process, that the appellant's Assignment of Errors and Statement of Points indicated "4," sub-pars. "j" and "k" (R. 75, 76, 81, 82), are well grounded, and that reversible error was

committed below in holding the Control Law constitutional and in dismissing the bill.

(G) The Control Law's Arbitrary Classification Denies Plaintiff the Equal Protection of the Laws.

Admittedly, the 21st Amendment gives the states broad regulatory powers over *imports* of intoxicants (*State Board of Equalization* v. *Young's Market Co.*, and other cases *ante*, p. 26). In the case at bar, however, the traffic is in *exports* exclusively, to which the 21st Amendment has no relevancy, and the classification presented by the Control Law is unreasonable and arbitrary upon its face. The difference between an interstate *contract* motor carrier, declared by the Control Law to be *ineligible* to receive the liquor Transporter's License, on the one hand, and an interstate *common* motor carrier, declared *eligible* to receive such license, on the other, is that the contract carrier conducts its business with particular customers pursuant to special contracts, copies of which it must file with the Interstate Commerce Commission, whereas the common carrier holds itself out to be willing to carry for the general public, at rates prescribed by that Commission and to transport the freight under obligations fixed by the common law and applicable statutes. This difference, as charged in the bill as amended (R. 25, 26), does not justify denying to contract carriers by motor vehicle the right to carry export whiskies in interstate commerce, which privilege the Control Law accords to common carriers by motor vehicle, because

the distinction bears no reasonable relationship to any supposed subject or object of the Control Law in the proper regulation of the liquor traffic.

Inasmuch as the 21st Amendment is ineffective and inoperative with respect to exports, and because of the facts that with respect to exports the *Motor Carrier Act, 1935*, and the *Knox Act, Federal Alcohol Administration Act* and *Liquor Enforcement Act of 1936* fully occupy the field, and the Commerce Clause itself is self-executing in matters of the character under consideration (*ante*, pp. 34; 39-68), Kentucky is powerless to regulate the transportation of exports of liquors from *Kentucky in interstate commerce, even if the same be borne by common carriers. Kentucky is impotent to control interstate export cargoes of liquors or to prevent their diversion to improper channels or to unauthorized persons, whether the carrier be a common or a contract carrier.* Therefore, the assumed classification has no tendency to prevent such diversions or abuses. Furthermore, the classification has no tendency to assure that liquors will be transported by reliable and honest carriers who would not engage in or permit such abuses or diversions, for, obviously, the operating personnel of a motor carrier may be honest and trustworthy, or dishonest and untrustworthy, but whether they be of one or the other character is not determined, influenced or affected by reason of the carrier being a contract carrier, on the one hand, or a common carrier, on the other. Moreover, the Kentucky Legislature and the Control Board manifestly did not genuinely regard the dangers of such diversion or other

improper actions in the conduct of the carriers' liquor transportation business to be actually grave. This is shown by the penal amount of the bond required of the holder of a Transporter's License fixed at a paltry $1,000.00 by the Control Board's Regulations, made pursuant to authorization of the Control Law, Sec. 37 (R. 19). In other words, the Control Law, as enacted and administered, asks nominal security of the common carrier, and will not permit a contract carrier to continue business on any terms. Interesting too, and of weighty significance, is the fact that the Control Law contains not a single provision looking to the policing or surveillance of the business activities of holders of Transporter's Licenses.

We contend that the attempted distinction is utterly artificial and possessed of no reasonable relation to the realities involved, that when Kentucky's General Assembly undertook to debar contract carriers from the interstate whiskey export business it exceeded all permissible latitude in classification.

In

COTTING v. GODDARD AND KANSAS CITY STOCKYARDS CO.,
183 U. S. 79, 46 L. Ed. 92,

the Court held a Kansas statute, which undertook to regulate the charges made for their services by stockyards doing a large volume of business, but which omitted regulation of the service charges of stockyards doing a small volume of business, to be repugnant to the Equal Protection Clause. The Court's view was that

for the purpose of regulating charges for services it was not permissible to classify the businesses according to their sizes, and that small businesses could not be granted preferential treatment over large businesses. Much more objectionable—it would seem to be—is a classification which accords preferential treatment to large enterprises as compared with small enterprises, which is the precise situation involved in the case at bar, the large and strong common carriers by motor vehicle being allowed by the Control Law to engage in the business, and the relatively small and weak contract carriers being prohibited from engaging therein. Well might the Court say of the classification here presented, as it vigorously did say of the classification before it in *Cotting v. Goddard, supra,* that the business of Ziffrin, Inc., is not to be made the object *"of the legislative scalping knife."*

The *"classification"* presented upon this appeal would seem to be fatally bad within the rule and doctrine of

CONNOLLY v. UNION SEWER PIPE CO. (1902), 184 U. S. 540, 46 L. Ed. 679.

The Sewer Pipe Company brought suit against defendant, Connolly, on two promissory notes which he had given plaintiff in part payment of pipe purchased from it. Connolly attempted to defend on the ground, and averred, that the plaintiff had violated an Illinois statute prohibiting combinations of capital and skill, and acts by two or more persons, for the purpose of creating restrictions in trade, limiting production, con-

trolling the prices of commodities or to prevent competition in manufacture, transportation, sale or purchase of commodities. The *9th section* of the Illinois statute provided that the Act's provisions should not be applicable to agricultural products or to live stock while in the hands of the producers or raisers: its *10th section* provided that any purchaser of any commodity from any person transacting business contrary to the provisions of the Act should not be liable for the price or payment for such commodity.

After having heard the case twice argued, this Court affirmed the judgment below for plaintiff, holding that defendant's plea of exoneration under the 10th section of the statute did not present a defense, because, by reason of its discriminatory 9th section the statute was in violation of the Equal Protection Clause. The Court held that the exemption contained in the 9th section represented arbitrary classification which rendered the 10th section void with respect to persons not comprehended within the categories of the 9th section.

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that *in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.*" (Italics ours.)

All to the end, stated in *Cotting* v. *Goddard* (*ante*, p. 77),

> "It has been wisely and aptly said that *this is a government of laws, and not of men;* that there is no arbitrary power located in any individual or body of individuals; but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them." (Italics ours.)

We believe the principles of the foregoing cases show that the Court below erred in ruling in its Conclusions of Law that the Control Law's provisions rendering common carriers by motor vehicle eligible, and contract motor carriers ineligible, to obtain the liquor Transporter's License, are valid (R. 62). Upon well settled principles the purported classification is nothing more than arbitrary selection and the Control Law properly should be deemed repugnant to the Equal Protection Clause (Assignment of Errors and Statement of Points, designated, "1," "2," "3," and "4," subparags. "k" and "l," R. 73, 76, 79, 80, 82).

(H) The Control Law's Extreme Penalties Contravene Both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In addition to contravening the Equal Protection Clause by arbitrarily selecting common carriers by motor vehicle as the only motor carriers eligible for the liquor Transporter's License, the Control Law also is repugnant to that same clause—and to the Due Process Clause, as well—in that for violation of its terms

and provisions the Control Law provides penalties so severe and extravagant as to preclude resort to the courts in ordinary course to secure a judicial review of the validity of the Control Law and of the penalties thereby provided.

The Control Law affords the affected motor carrier no adequate opportunity in an appropriate judicial proceeding safely to test the validity of the Law or the validity of the prescribed penalties. The Control Law makes no provision for an injunction pending such test by judicial review, and makes no provision to relieve a motor carrier conducting the test from liability for penalties incurred during the pendency of the test proceeding.

COTTING v. *GODDARD* (*ante*, p. 77), concerned itself not only with classification, but also with the question whether the statutory penalties there involved did not of their own force deny the Stockyards Company the equal protection of the laws. Compared with the savage penalties provided by the Kentucky Control Law, the penalties fixed by the Kansas statute were comparatively mild. The Kansas statute's maximum penalties were provided for fourth and subsequent offenses, and consisted in a fine of $1,000.00 and six months' jail sentence—penalties not even 10% so severe as those provided by the Control Law. Nevertheless, the Court inclined to the view that the Kansas penalties were so severe as to constitute a denial of equal protection, saying:

> *"In this feature of the case we are brought face to face with a question which legislation of other*

states is presenting. Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that, upon a failure to make good that claim or defense, the penalty for such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss? * * *

"* * * But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws." (Italics ours.)

Later, in

Ex Parte Young, 209 U. S. 123, 52 L. Ed. 714,

extreme penalties again were presented. The Court cited *Cotting* v. *Goddard, supra,* with approval, and quoted liberally from the opinion therein. In the *Young Case* a Minnesota statute, prescribing penalties for violation by railroads of prescribed maximum freight and passenger rates, was held unconstitutional because of the severity of the penalties. The Court's view was that, in practical operation and affect, the severity of the penalties prevented resort to the courts to determine the validity of the rates themselves, and therefore denied the carrier the equal protection of the laws.

The Kentucky *Control Law*—for an act of transgression which, after all, is only *malum prohibitum*—provides a maximum penalty of *$10,000.00 fine and ten years' imprisonment.* The Minnesota statute's maximum penalties were only 50% so stringent—having been a *$5,000.00 fine and 5 years' imprisonment.*

Speaking of the Minnesota penalties, and holding the Minnesota statute unconstitutional *on its face* because of the provision of those lesser penalties, the Court said:

> "It would be difficult, if not impossible, for the company to obtain officers, agents, or employees willing to carry on its affairs, except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the commission. *The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts* (either state or Federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. * * *
>
> "* * * *We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the*

validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates." (Italics ours.)

MISSOURI PAC. R. R. CO. v. TUCKER,
230 U. S. 340, 57 L. Ed. 1507,

held invalid a statute providing for liquidated damages of *$500.00* to be paid by a railroad which exceeded the statutory tariff on shipments of oil in barrels, and which omitted provision for a hearing in advance to determine the validity of the statutory tariff rate, the Court taking the view that the carrier's opportunity to make defense, at the risk of having to pay what was regarded as an enormous penalty, was merely illusory.

SOUTHWESTERN TEL. & TEL. CO.
v. DANAHER,
238 U. S. 482, 59 L. Ed. 1419.

The Court here reversed a judgment enforcing a statutory penalty imposed at the rate of *$100.00 per day*, aggregating $6,300.00, against a telephone company because of its impartial enforcement against one of its patrons of a regulation discontinuing service to any patron in arrears for past service, on the ground that the penalties took the Company's property without due process of law.

OKLAHOMA OPERATING CO. v. LOVE,
252 U. S. 331, 64 L. Ed. 596.

An Oklahoma statute empowered that state's Corporation Commission make orders prescribing rates

charged by public service trades, prescribed a *$500.00* penalty for disobedience of orders so made, made each day's continuance of the refusal a separate offense; judicial review of such a rate order was afforded only by interposing defense to contempt proceedings based on violation. The Court held the plaintiff laundry company to be entitled to a temporary injunction restraining the Corporation Commission from enforcing the penalties, saying:

> "Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements * * *."

OKLAHOMA GIN CO. v. OKLAHOMA,
252 U. S. 339, 64 L. Ed. 600,

involved the same Oklahoma statute in application to a cotton ginning company. The penalties again were held void.

> "* * * the provision concerning penalties for disobedience to an order of the Commission was void because it deprived the company of the opportunity of a judicial review."

NATURAL GAS PIPE LINE CO. v. SLATTERY,
302 U. S. 300, 82 L. Ed. 276.

Because it had not exhausted its administrative remedies before the Utilities Commission of Illinois, the appellant was denied an interlocutory injunction restraining the Commission's order directing appellant to open its books and records for inspection and

to furnish statistical data. The Illinois statute imposed penalties of from *$500.00 to $2,000.00 a day* for failure to comply with such orders. However, in passing, and speaking of these penalties and *what would have been the situation had the appellant, without avail, attempted to secure relief by pursuit of the administrative remedies,* the Court said:

> "As the act imposes penalties of from $500.00 to $2,000.00 a day for failure to comply with the order, any application of the statute subjecting appellants to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process, *Ex parte* Young, 209 U. S. 123 * * *."

Sharply to be contrasted with the foregoing are the cases in which severe penalties have been sustained, but in which the statutes, imposing the penalties, *afforded opportunity for a judicial review by a suit in equity* "* * * during the pendency of which the operation of the penalty *provision could have been suspended by injunction*" (*St. Louis, I. M. & S. Ry. Co.* v. *Williams*, 251 U. S. 63, 64 L. Ed. 139, penalty,—$300.00, costs and attorneys' fee; and also, *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 59 L. Ed. 405, maximum penalty, $5,000.00 per day).

No adequate or sufficient provision for judicial review is made by the Control Law in a situation such as exists in the case at bar.

The law does not require the doing of a vain thing. Admittedly, appellant being a contract carrier, the Director of the Division of Motor Transportation did not err in declining to grant plaintiff a common carrier's certificate, which is a certificate of public convenience and necessity which may be issued only to motor carriers engaged in the business of common carriage. It would have been nothing short of folly for plaintiff to have appealed from the decision of the Director of the Division of Motor Transportation to the Franklin Circuit Court and thence to the Court of Appeals of Kentucky by pursuing the statutory appeals provided by the Kentucky Motor Vehicle Transportation Act (Ky. Stats., Sec. 2739j, Subsecs. 86-88; App. 19, 20). Affirmance of the Director's correct decision could have been the only result of such appeal. Similarly, inasmuch as plaintiff had been denied the requisite common carrier's certificate, it would have been frivolous and useless for the plaintiff to have appealed from the decision of the Alcoholic Beverage Control Board and of the Commissioner of Revenue denying plaintiff a liquor Transporter's License (a) because none of the enumerated statutory grounds of appeal provided by the *Control Law, Sec. 49,* existed (App. 6-8); (b) inasmuch as plaintiff upon appeal would have been confined to the grounds enumerated in the statute conferring the right of appeal, the issue of unconstitutionality of the Control Law could not have been presented upon such appeal, such challenge not being one of the enumerated statutory grounds of appeal; and

(c) during the pendency of such futile appeals in both the Franklin Circuit Court and in the Court of Appeals of Kentucky the appellant could not have obtained the benefit and protection of an injunction *pendente lite.*

The Control Law outlines the grounds of the statutory appeal and the procedure thereon. It not only fails to provide for the award of an injunction pending the appeal under the circumstances which existed in this case, but by clear implication the statute negatives the jurisdiction of the Kentucky Courts to award such injunction. The situation of an applicant for a license whose application is denied by the Control Board certainly is not superior to that of a licensee whose license has been revoked or suspended by an order of the Control Board. With respect to the latter the *Control Law* provides, in the concluding paragraph of *Sec. 49, Ky. Stats., Sec. 2554b-147* (App. 6-8), that in the event of such revocation or suspension the licensee at once shall suspend all business and other operations authorized by his license, and that even though he may appeal from the order of revocation or suspension to the Franklin Circuit Court, *no Court shall have authority to enjoin the operation of the order of revocation or suspension pending the appeal.* It provides further that during the pendency of the appeal in the Court of Appeals of Kentucky, neither that Court, nor any other Court, shall have authority to issue an injunction to suspend the operation of the Franklin Circuit Court's judgment upholding the Board's order of

suspension or revocation. Both by omission to provide for an injunction, and by express prohibition of injunction in a somewhat analogous situation, the Control Law shows that had Ziffrin, Inc., appealed from the Control Board's order denying it a liquor Transporter's License, during the prosecution of such appeal the appellant would have been without the protection of an injunction and unable to do business, with the necessary consequence that its contracts would have been lost and its business would have been destroyed.

Furthermore, there is no provision in the Control Law to the effect that its prescribed penalties shall not be imposed for transportation activities engaged in during the pendency of the appeals referred to. The Control Law affords no immunity to the unlicensed contract carrier, which, having been denied a Transporter's License by the Control Board, appeals, and continues to transact its business pending a determination of the statutory appeal.

It is a matter of common knowledge that due to a congested docket more than a year elapses from the docketing of an appeal in the Court of Appeals of Kentucky until that appeal is decided. If by advancement on the dockets, the suppositious statutory appellate proceeding in the Franklin Circuit Court and in the Court of Appeals of Kentucky could have been brought to a final determination in a well-nigh unprecedented period of ninety days, and if Ziffrin, Inc., had engaged in but one transaction of unlicensed transportation on each of those days, appellant, never-

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theless, would have rendered itself liable to maximum penalties of $895,000.00, would have rendered each of its responsible officers and participant-employes subject to fines in like amount, and to imprisonment for 895 years,—if their terms had been adjudged to run consecutively, and not concurrently.

The Control Law's provisions for judicial review, such as they are, in failing to provide for pre-determination of validity, for injunction or exemption from penalties during the pendency of the appeal, manifestly are inadequate to save the excessive penalties from conflict with the Fourteenth Amendment. The District Court below erred in ruling to the contrary, and its rulings in that particular have been assigned as error (Assignment of Errors and Statement of Points, "1," "2," "3," and "4," Subparag. "1"; R. 73, 76, 79, 80, 82).

(I) The Court Below Committed Additional Errors With Respect to Making Conclusions of Law and Acting Thereon.

The judgment below is based upon, and attributable to, what we conceive to be entirely erroneous conceptions of fundamental constitutional principles. The District Court's concepts are evidenced by its stated Conclusions of Law, a number of which previously have been discussed. There remain, however, five important Conclusions of Law, avowedly made the bases and grounds of the District Court's decision, some of which Conclusions, *if correct*, would justify the entry

of the judgment appealed from. However, if our reading of the authorities is correct, then each of these remaining Conclusions is entirely erroneous. We, therefore, deem it important to examine the remaining Conclusions.

1. *Supposed Inability to Penetrate Legislative Intent to Stifle Competition.*

The first of these remaining Conclusions (but one which is not necessarily determinative of the questions involved) states that the Court is powerless to say that the Control Law shows on its face a legislative intent and design to give common carriers a competitive advantage over contract carriers, and to discriminate against and to exclude the latter from transacting the business in question (R. 58), and the making thereof has been assigned as error (Assign. of Errors and Statement of Points, identified, "4," subparag. "m," R. 76, 82). In *Buck* v. *Kuykendall,* and in *Frost Trucking Company* v. *Railroad Commission* (*ante,* p. 46, 69), the Court took a different view of the matter, examined the statutes involved, and determined that they represented nugatory attempts to prefer certain motor carriers to other motor carriers and to prevent and limit competition. In the *Buck case* the Court said of the statute:

> "*Its primary purpose* is not regulation with a view to safety or to conservation of the highways, *but the prohibition of competition.* It determines not the manner of use, but the persons by whom

> the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner." (Italics ours.)

Again, in the *Frost Trucking Co. case, involving a contract carrier:*

> "It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. *Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions.* Protection or conservation of the highways is not involved." (Italics ours.)

It thus sufficiently appears that the District Court below had plenary power to penetrate the sham and pretense of the Control Law; to take cognizance of the transparent design of the Kentucky General Assembly to prefer common carriers to contract carriers in the transportation of whiskey in interstate commerce and to make a gift to the former of the latter's business, that the Court below was possessed of ample inherent power to denounce that attempt as spoliation by legislative fiat. We believe the failure of the specially constituted Court so to do was error, and one which now well might be rectified.

2. *Congress has not Invited States to Regulate the Business in Question.*

We heretofore have shown that the District Court below erred in its view that there is a lack of National legislative control over motor carriers engaged in transporting exports of intoxicants in interstate commerce (*ante,* p. 51-68). The Court below erred further in its Conclusion of Law that the supposed lack of National legislative control is tantamount to a deliberate and considered *invitation by Congress to the several states* themselves to control the interstate traffic in exportation of intoxicants (R. 57). The Court below made its last mentioned Conclusion a ground of its decision dismissing the bill (R. 67). Appellant has assigned error with respect to this most material Conclusion (Assign. of Error, and Statement, designated, "4," subparag. "f"; R. 75, 81).

Were there, in fact, an omission of Congressional action, that omission would not be deemed an invitation to the states to embark upon regulatory adventures of their own, but under recognized rules of interpretation such omission would be deemed to manifest Congressional intent that the traffic should be free and untrammeled. This result would flow from the self-executing character of the Commerce Clause in application to the direct and substantial interferences with interstate commerce in matters of National concern, admitting of and requiring uniformity of regulation, herein presented.

The omission of Congress in the *Wilson Act, Webb-Kenyon Act, Knox Act, Motor Carrier Act, 1935, Federal Alcohol Administration Act,* and *Liquor Enforcement Act of 1936,* to say whether the states shall, or shall not, have power to regulate exports of intoxicants by motor carriers is not properly to be deemed an invitation to the states to exercise regulatory powers over such exportations—which was the erroneous view taken by the District Court below—but is to be deemed to be a manifestation of the will and purpose of Congress that such export traffic shall remain free and untrammeled, except for the regulations imposed by Congress itself, and that uniformity—though it be the uniformity attained by *governmental non-action*—was, and is, necessary to preserve equality of opportunity and of treatment among the various communities concerned. The rule referred to has been stated and applied in numerous cases.

WELTON v. STATE OF MISSOURI,
91 U. S. 275, 23 L. Ed. 347.

In disposing of the contention that the state act, prescribing a license tax, should be upheld because Congress had not occupied the field by legislation of its own, the Court said:

> "The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. *Its inaction* on this subject, when considered with reference to its legislation with respect to foreign commerce, *is equivalent to a declaration that in-*

terstate commerce shall be free and untrammeled." (Italics ours.)

WILKERSON v. RAHRER,
140 U. S. 545, 35 L. Ed. 572.

"The power of Congress to regulate commerce among the several states, when the subjects of that power are *national* in their nature, is also *exclusive.* The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, *it was left free except as Congress might impose restraint.* Therefore, *it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states.*" (Italics ours.)

BRENNAN v. CITY OF TITUSVILLE,
153 U. S. 289, 38 L. Ed. 719.

"* * * but we think it must be considered, in view of a long line of decisions, that *it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free.*" (Italics ours.)

MISSOURI v. KANSAS NATURAL GAS CO.,
265 U. S. 298, 68 L. Ed. 1027,

presented the question whether it was competent for the state to regulate the gas company's business of transporting natural gas from one state to another for

sale, which turned upon the question whether that business properly was to be regarded as interstate commerce, and as such, free from state interference in the absence of Federal legislation.

> "But the *commerce clause* of the Constitution, *of its own force, restrains the states from imposing direct burdens upon interstate commerce.* * * *
>
> "*The contention that,* in the public interest, *the business is one requiring regulation,* need not be challenged. *But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation.* * * *
>
> "The transportation, sale, and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. *The paramount interest is not local but national*—admitting of and *requiring uniformity of regulation. Such uniformity, even though it be uniformity of governmental non-action, may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned.*" (Italics ours.)

It is not as though Congress never had directed its attention to the matter of interstate exports of intoxicants. To a limited extent Congress has exercised control of the export traffic. The *Knox Act* (App. 41), renders it a criminal offense, punishable by substantial fine or one year's imprisonment, or both, to ship, or to cause to be shipped, from one state to another state

any package containing alcoholic liquors fit for beverage purposes unless the package be so *labeled* on the outside cover as plainly to show the name of the consignee and the nature and quantity of the contents. *Federal Alcohol Administration Act* (App. 12), contains similar provisions. *This far Congress has gone with respect to exports, and its omission to go farther indicates that Congress did not deem further regulation of exportation needful or advisable.* The case at bar is not one of *circumscribed Congressional regulation* in a limited field, in which situation the state is deemed uninhibited to impose its regulations in the unoccupied remainder of the general field, so long as such state regulations pertain only to matters of *local concern* and only *incidentally* and indirectly affect or burden interstate commerce, which distinguishable situation is well typified by *Atchison, T. & S. F. R. R. Co. v. R. R. Commission,* 283 U. S. 380, 75 L. Ed. 1128. With respect to matters which in their essential nature admit of and require uniformity of regulation throughout the length and breadth of the land, Congress has legislated with respect to the *importation* of intoxicants repeatedly, and in great detail, but has seen fit to omit to legislate with respect to *exportation* of intoxicants —packaging and labeling, under the Knox and Federal Alcohol Administration Acts, excepted. The inference authorized by the decisions is that both *by action* and *inaction* Congress has indicated that it intended—packaging and labeling requirements excepted —that nation-wide interstate commerce in the exporta-

tion of intoxicants should be free and untrammeled, and that it should not be subjected to state regulation.

In concluding, as matters of law, (a) that there is a "conspicuous" lack of Congressional action, and (b) that such supposed absence of Federal legislation constitutes an invitation to the states to exercise their regulatory powers, the Court below heaped one error upon another.

3. *Commencement of Interstate Commerce.*

The District Court below further stated among its Conclusion of Law that the cargoes of liquors—delivered by the sellers to the plaintiff in Jefferson County, Kentucky, for direct, immediate, uninterrupted and continuous transportation from the consignor-sellers to the consignee-buyers at the latter's places of residence and domicile situated in Indianapolis, Chicago and other places north of the Ohio River—being wholly within the territorial boundaries of Kentucky, are not yet in interstate commerce (R. 59). Assignment of Errors and Statement of Points, identified, "4," subparag. "g," (R. 75, 81) are directed to this Conclusion of Law, which is inconsistent with cardinal principles. The Control Law assumes to denounce as a criminal offense, punishable by heavy penalties, acceptance by plaintiff, in Kentucky, from vendor-consignors there engaged in business, of consignments of whiskies sold to residents of Indianapolis and Chicago, under contracts calling for the delivery of the whiskies to the purchasers at their places of residence and which consignments are delivered to

the plaintiff in Kentucky, intended, consigned and destined for immediate, direct, continuous and uninterrupted carriage to the consignee-purchasers at their places of residence and business location. (*Ante*, pp. 6-8). Yet, it is precisely at the moment of delivery of the consignment to the carrier that the commerce acquires its interstate character and the protection of the Commerce Clause. It is well settled that interstate commerce commences when the goods start upon their journey destined for delivery in another state, or, upon their *delivery to a carrier* for such transportation.

THE DANIEL BALL v. U. S.,
10 Wall. 557, 19 L. Ed. 999.

The vessel's *operations were confined within the territorial limits of a single state,* Michigan. Nevertheless, it was held that the commerce conducted by her was interstate the moment she started to move articles destined for ultimate delivery—by the aid of a connecting carrier—to another state.

> "So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for *whenever a commodity has begun to move as an article of trade from one state to another, com-*

merce in that commodity between the states has commenced." (Italics ours.)

TEXAS, ETC., R. R. CO. v. SABINE TRAM CO.,
227 U. S. 111, 57 L. Ed. 442.

"We have had occasion to express at what point of time a shipment of goods may be ascribed to interstate or foreign commerce, and decided it to be when the goods have actually started for their destination in another state or to a foreign country, *or delivered to a carrier for transportation.*" (Italics ours.)

Defendants contended below, and the Court below took the view, that the Kentucky Control Law operates before plaintiff's cargoes acquire immunity under the Commerce Clause, but the identical contention was completely answered in—

LEMKE v. FARMER'S GRAIN CO.,
258 U. S. 50, 66 L. Ed. 458.

"Nor will it do to say that the state law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce." (Italics ours.)

Other cases showing that plaintiff's cargoes are to be deemed in interstate commerce and entitled to the protection of the Commerce Clause are: *Coe* v. *Errol*, 116 U. S. 517, 29 L. Ed. 715; *Southern P. Term. Co.* v. *Interstate Commerce Comm.*, 219 U. S. 498, 55 L. Ed. 310; *Railroad Comm.* v. *Texas, Etc., R. R. Co.*, 229 U. S. 336, 57 L. Ed. 1215; *I. C. R. R. Co.* v. *DeFuentes*,

236 U. S. 157, 59 L. Ed. 517; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239.

Plaintiff's cargoes of export liquors—intended, designed and consigned, as they are, for immediate, direct, uninterrupted and continuous transportation to destinations in other states for delivery to purchasers there residing and doing business—gain sanctuary the moment plaintiff receives the same for such transportation. We, therefore, contend that the Court below committed fundamental and prejudicial error in rendering its judgment, avowedly based upon its Conclusion of Law that plaintiff's cargoes are not to be deemed in interstate commerce and, consequently, are not entitled to the protection of the Commerce Clause.

4. *Greater Power Including Lesser—Fallacious.*

Plaintiff also has assigned as error, *Assignment of* Errors and Statement of Points identified as "4," subparag. "h" (R. 75, 81), the Court's Conclusion of Law, by the Court made a ground of its decision (R. 60), that, inasmuch as it is competent for a state to prohibit the manufacture of intoxicants, and inasmuch *as the greater power includes the lesser,* the state may *permit* manufacture *conditionally,* and it is competent for the state to control the manufactured product, *including power to control the transportation thereof in exportation* from such state to a sister state in commerce among the several states.

The error in this Conclusion is attributable to the not uncommon fallacy of transfer of authority—bodily transferring, from the world of physical things and

physical laws, a principle there valid, to the inhospitable foreign domain of juridical concepts, governed by quite different laws, where the transplanted principle lacks validity. The error is attributable to the fallacy inherent in the major premise's assumption that the facts present a situation of a comprehensive, collective, "greater" and a like and included "lesser." Admittedly, it is within the power of a state to prevent importation of liquors and to prohibit manufacture of intoxicants within its borders. If a state does so, the commodity does not come into *existence* within its confines. So long as no liquor exists within the state, in the nature of things, no question of interstate commerce in that commodity (non-existent) possibly can arise. However, if a state permits importation, manufacture, sale and transportation within its borders —*as Kentucky does*—and if the state thus allows liquors to originate and to exist within its borders—*as Kentucky does,* on a scale of which she boasts—then the state cannot prohibit or regulate *interstate export* traffic therein. *Prevent the origination of intoxicants within its borders, a state may, but once a state has allowed intoxicants to come into existence and to become the potential subjects of interstate commerce, the commodity becomes subject, not only to the police power of the state, but also to the commerce powers of the Nation, and where an attempted exercise of the police power collides with the commerce power, the commerce power prevails and the police power fails.* This brief is replete with the cases in which it solemnly has been determined that in cases of such conflict the

National Law prevails. In the interest of brevity, repetition of citations to these cases is omitted.

Grants of certain rights and privileges a state may withhold (*Paul* v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357); but if the state elects to grant and allow such rights and privileges the state cannot couple therewith a requirement of the acceptance of unconstitutional conditions (*Blake* v. *McClung*, 172 U. S. 239, 43 L. Ed. 432; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 54 L. Ed. 355; *Pullman Company* v. *Kansas, supra*; *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 66 L. Ed. 352; *Frost Trucking Co.* v. *Railroad Commission, supra*). The rule is established that constitutional guarantees are not to be abridged by the employment of any such convenient strategem. The establishment of that salutary principle necessarily extirpated the sophistry—which unanalyzed, may be superficially plausible—of inclusion of lesser in greater powers. It is no more permissible to say (a) that because Kentucky may prohibit importation and manufacture of intoxicants, Kentucky may allow importation, manufacture, sale and transportation, on condition that no contract carrier of property by motor vehicle may transport exports of intoxicants in interstate commerce, than it would have been to have said (b) that because Missouri had power to abolish her law school, she might maintain it and exclude negro students therefrom (*Missouri* v. *Canada*, 305 U. S. 337, 83 L. Ed. 207). The case last cited would seem to have eradicated "the greater power contains the lesser" fallacy unfortu-

nately interpolated by *Davis* v. *Massachusetts*, 167 U. S. 43, 42 L. Ed. 71.

5. *Broadening the Police Power.*

The final Conclusion of Law which plaintiff has assigned as error (Assignment of Errors and Statement of Points, designated "4," subparag. "i," R. 75, 81) is that the states' police powers should be broadened (R. 57). This Conclusion is important because it affords, we believe, a key to an explanation of the District Court's entire Opinion and to the judgment itself, holding that the Control Law is not repugnant to the Commerce Clause or to the Due Process or to the Equal Protection Clauses.

We believe it is accepted legal theory that the police power is neither to be restricted nor broadened; but that the police power represents and comprises the residual powers of the state not delegated to the National government and not limited by Constitutional provisions; and that whatever the police power is, it is, and that it neither waxes nor wanes. That we understand to be the accepted theory. We recognize, of course, that from time to time and in weighing and appraising factual situations in the light of changed conditions, a regulatory measure of a character deemed unreasonable at one time and under one set of conditions then obtaining, at another time and under different conditions contemporaneously obtaining, may be regarded as reasonable. This does not mean that the police power has changed or that it has been broadened; this does not mean that it was restricted or confined in the

first instance or that it was broadened in the latter instance. All that the change signifies is that in the light of changed conditions the Court has arrived at a different conclusion of psychological fact, or, otherwise stated, that the earlier decision "* * * *was a departure from the true application"* of the governing principles. (Compare, *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 81 L. Ed. 703, with *Adkins* v. *Children's Hospital,* 261 U. S. 525, 67 L. Ed. 785.)

However, if a disputant remains unconvinced and adheres to the view that the *Minimum Wage Cases* demonstrate an actual broadening of the police power, we would reply that if his approach be correct, then the National government's commerce powers are to be deemed to have enjoyed like and proportionate growth, and we would invite attention first to the decision in *Adair* v. *U. S.,* 208 U. S. 161, 52 L. Ed. 436 (*infra,* pp. 113, 114), and contrast the decision therein (that the commerce power does not invest Congress with authority to denounce as a crime an interstate carrier's interference with the labor organiaztion of its employees) with the decision in *Natl. Labor Rel. Bd.* v. *Jones & Laughlin Steel Co.,* 301 U. S. 1, 81 L. Ed. 893. (Curiously enough, the Opinion below states that the National government's commerce powers have "broadened," R. 53.)

And, if it be conceded, for the purposes of argument, that both the police power and the commerce power have been enlarged, such confession in nowise militates against the validity of the controlling principles, aptly expressed in *Wilkerson* v. *Rahrer, supra,*

"The *power of Congress* to regulate commerce among the several states, *when the subjects of that power are national in their nature, is also exclusive.* * * * And *if a law passed by a state in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the state cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof.* Gibbons v. Ogden, 22 U. S., 9 Wheat. 210. *That which is not supreme must yield to that which is supreme. Brown* v. *Maryland,* 25 U. S., 12 Wheat. 448." (Italics ours.)

It is not inappropriate at this juncture to re-read the Chief Justice's concluding admonitory paragraph in *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. Ed. 23,

"Powerful and ingenious minds, taking, as pastulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, *explain away the constitution of our country, and leave it a magnificent structure indeed, to look at, but totally unfit for use.* They may so entangle and perplex the understanding, as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles, to

sustain those principles, and, when sustained, to make them the tests of the arguments to be examined." (Italics ours.)

Whatever be the scope of the state's police power, that power is subordinate to the commerce powers of the Nation, and when an attempted exercise of the police power conflicts with the commerce powers, as the Kentucky Control Law conflicts therewith, the inferior state law is invalid, and needs must yield to the Nation's supreme law.

(J) None of the Cases Relied Upon in the Opinion Rendered Below Is In Point.

Not one of the decisions cited in support of the Conclusions of Law and decisions of the Statutory Three-Judge Court drawn in question upon this appeal is apposite. The only case cited in the Opinion below involving a motor carrier is

COMMONWEALTH OF PENNSYLVANIA
v. ONE DODGE,
326 Pa. 120, 191 Atl. 590, 110 A. L. R. 919 (R. 56, 61).

This case comes closer to being in point than any of the other cases cited in the Opinion below in that it involved both a motor carrier and interstate exportations of whiskey. So far as we have been able to ascertain, it is the only case presenting that combination of facts. However, the Pennsylvania case is clearly distinguishable on many grounds, as we shall show.

American Motor Lines, a partnership, was engaged in the transportation of freight by motor truck between Pittsburgh, Pa., Baltimore, Md., Cumberland, Md., and Washington, D. C. In the conduct of its business the firm hired one Stambaugh to drive his Dodge truck for the firm as it might direct. A 1933 Pennsylvania statute provided that it should be unlawful for any person to transport for hire within the Commonwealth of Pennsylvania any alcoholic liquids without first having obtained a permit from the Commonwealth as provided in the act. The Pennsylvania statute provided that applicants for such permits should give bond for the faithful observance of the permit and of the laws of Pennsylvania, and pay a $100.00 license fee. Neither the carrier, nor any of the partners, nor Stambaugh, applied for the permit, gave the bond, paid the fee, or secured the permit.

July 24, 1935 (prior to enactment of Motor Carrier Act, 1935), the carrier received from a distiller located at Schenley, Pa., a shipment of liquor for transportation for hire and delivery to a consignee in Washington, D. C. At Pittsburgh the liquor was loaded on the Dodge truck, owned and driven by Stambaugh. After the truck had been loaded, but before it left Pittsburgh, the truck and cargo were seized and impounded because of the failure of the carrier and Stambaugh to obtain a permit. The Pennsylvania act, like the Kentucky Control Law, provided that intoxicants transported in violation of its provisions and the vehicle bearing the same, should be deemed contraband and be subject to confiscation; and the Pennsylvania Court

sustained these provisions in application to the Dodge truck and its cargo.

Obvious grounds of distinction are:

(a) In the Pennsylvania case the carrier, the partners and Stambaugh were eligible to obtain a permit, but declined to apply for the same, declined to execute the required bond and to pay the specified license fee, whereas in the case at bar, under the Control Law, plaintiff has been declared ineligible to receive a Transporter's License merely because it is a contract carrier, and plaintiff seasonably published required notice, made proper application for Common Carrier's Certificate and Transporter's License, executed the required bond, paid the required fees for Common Carrier's Certificate and Transporter's License, and did everything humanly—and corporately—possible to avoid controversy, and to comply with the laws of Kentucky;

(b) In the Pennsylvania case—the question of the power of a state to require an interstate motor carrier to obtain a certificate of convenience and necessity was not involved;

(c) The power of a state to require a contract carrier to convert itself into a common carrier as the price of continuing business was not involved;

(d) The question of the validity of a classification, determining eligibility to operate, based upon whether a motor carrier is a contract carrier or a common carrier, was not involved;

(e) No question of the validity of an act containing penal provisions so extreme and severe as to preclude resort to the Courts in ordinary course was involved;

(f) The reasonableness of the regulation was not presented in the trial court or presented by the record upon appeal, and was said by the appellate court not to have been properly before it—

> "The reasonableness of the regulation by the state was not raised, in, nor discussed by, the court below. In his brief in this court counsel for appellees has attempted to argue that the provisions of the act are unreasonable and burdensome, but, as the case was presented in the court below, the question is not properly before us,"

whereas in the case at bar, the question of reasonableness was presented in the District Court below and is properly before this Court;

(g) The State Court's opinion is silent with respect to whether the $100.00 license fee was devoted to defraying expenses of the department charged with enforcing the Pennsylvania act. It may be that the monies realized from the fees were so devoted, in which event the actual decision of the Pennsylvania Court may have been correct (although reading of the opinion shows the Court's reasons to have been erroneous, and further shows the cases upon which it relied were misinterpreted by it and do not justify the conclusions reached) on the ground that the Pennsylvania act represented but a registration and inspection measure of a character sustainable under the doctrine of *Kane* v. *New Jersey* and *Clark* v. *Poor* (*ante*, pp. 27-29), whereas the Kentucky Control Law cannot be interpreted or sustained as a registration or inspec-

tion act because the Control Law absolutely excludes a contract carrier—in its character as such—from engaging in the business; and

(h) The incident which gave rise to the Pennsylvania case having occurred prior to the enactment thereof, Motor Carrier Act, 1935, did not occupy the field of regulation.

If the foregoing is a correct interpretation of the *One Dodge case,* then that case is not in point, otherwise, the case is in direct conflict with the decisions of this Court. In neither event may the Pennsylvania decision be deemed to afford effective support for the rulings complained of herein.

The other cases cited in the District Court's Opinion (exclusive of those treating of the question of the Statutory Court's jurisdiction to entertain the motion to dismiss, which question is not presented upon this appeal) have less relevancy to the questions here in issue; but we conceive those decisions to demand brief analysis.

HALTER v. NEBRASKA,
205 U. S. 34, 51 L. Ed. 696 (R. 52).

A Nebraska statute prohibited using representations of the National flag upon articles of merchandise for advertising purposes. Defendants exposed for sale a bottle of beer upon which was printed, for advertising purposes, a representation of the flag, were prosecuted under the statute and convicted. In sustaining the validity of the statute the Court pointed out that Congress had established no regulation per-

taining to the use of the flag except with respect to registration of trade-marks. The transaction obviously was an intrastate one and the case has nothing whatever to do with interstate commerce, transportation of exports of liquor in interstate commerce, requirement of conversion of contract carrier into common carrier, classification, excessive penalties, or any of the other questions presented upon this appeal.

SHERLOCK v. ALLING,
93 U. S. 99, 23 L. Ed. 819 (R. 54, 59).

Defendants were the owners of a line of steamers employed in carrying freight and passengers on the Ohio River between Louisville and Cincinnati. Plaintiff's decedent lost his life in a collision between two vessels of the line which occurred within the territorial jurisdiction of Indiana. Founding his claim upon the Indiana Wrongful Death Statute, plaintiff recovered a judgment for damages, which was affirmed by the highest state Court. Defendants prosecuted writ of error, claiming that the application of the Indiana statute to the marine tort constituted a prohibited interference with interstate commerce. This Court affirmed the judgment, holding that the remedy afforded by the Indiana statute only *indirectly and remotely* affected interstate commerce, and pointed out that *Congress had prescribed no rule* with respect to the liability of owners of vessels for the negligently caused death of a passenger.

COOLEY v. BOARD OF WARDENS,
12 How. 299, 13 L. Ed. 996 (R. 56).

The validity of a Pennsylvania statute of 1803, prescribing the employment of harbor pilots, was sustained in view of an Act of Congress of 1789 expressly sanctioning such state laws.

UNITED STATES v. ADAIR,
152 Fed. 737 (R. 56).

A District Court overruled a demurrer to an indictment which charged the violation of a Congressional Act of 1898 which denounced as a criminal offense the making of "Yellow Dog Contracts" by interstate railroads, holding that the Act did not violate the 5th Amendment and that it was competent for Congress to enact the same under the Commerce Clause as a regulation of interstate commerce.

The Three Judge Court below thus relied upon a District Court's decision that it was competent for *Congress* to prohibit the making of "Yellow Dog Contracts" by interstate railroads in deciding, in the case at bar, that it is competent for *a state legislature* to prohibit a contract motor carrier from continuing to engage in its business,—an entirely different matter, and one concerning which the *powers of Congress and the powers of a state legislature are most dissimilar.* Furthermore, exists the fact, not mentioned in the Opinion below, that after having been convicted in the District Court, Adair appealed to the Supreme Court, which in *Adair* v. *United States,* 208 U. S. 161, 52 L.

Ed. 436, *reversed* the judgment of conviction, *remanded with directions* to set aside the judgment and the verdict, to sustain the demurrer, and *to dismiss the prosecution,* because in this Court's view the Commerce Clause did not clothe Congress with authority to declare it a crime for an interstate railroad to make a "Yellow Dog Contract," and upon the further ground that the act in question was repugnant to the 5th Amendment.

THE LICENSE CASES (THURLOW v. MASS.), 5 How. 504, 12 L. Ed. 256 (R. 58).

Three states' statutes prohibiting retail sales of intoxicants without licenses were sustained. The transactions were strictly domestic and essentially *intrastate.* As the Court said, the statutes acted upon the commodity "* * * after it has passed the line of foreign commerce and become a part of the general mass of property in the state." If the *License Cases* be otherwise interpreted, and particularly if they be interpreted to sanction state regulation of interstate imports, the fact remains that in such supposed interstate aspects they have been overruled by *Bowman* v. *Chicago & N. W. R. R. Company, Leisy* v. *Hardin, supra,* and other later cases previously cited which held the states to be powerless to regulate or to prohibit importations of intoxicants.

MINNESOTA RATE CASES (Simpson v. Shepard), 230 U. S. 352, 57 L. Ed. 1511 (R. 54).

These cases involved *intrastate* railroad rates. The rules established thereby are:

(a) absent Congressional action, a state may prescribe rates for intrastate carriage, even though the prescription thereof indirectly and incidentally affects interstate commerce by creating disequilibrium between intrastate and interstate rates; and

(b) the power of the states so to prescribe such intrastate rates is subject to the proviso that the rates so prescribed shall not be so low as to prove confiscatory.

The decisions in the Minnesota Rate Cases answer none of the questions herein presented, although explanatory *obiter dicta* of the opinion therein correctly enunciate the established rules of interstate commerce and are strictly consistent with our contentions herein.

MUGLER v. KANSAS, 123 U. S. 623, 31 L. Ed. 205 (R. 52, 58).

This case involved merely *intrastate* transactions. Held: it was competent for Kansas to prohibit the manufacture and intrastate sale of intoxicating liquors. Interstate commerce was not involved, no question was presented under the Commerce Clause and there was no attempted exercise of the police power conflicting with the commerce powers of Congress.

TOWNSEND v. YEOMANS,
301 U. S. 441, 81 L. Ed. 1210 (R. 53, 54).

A Georgia statute, fixing the maximum charges of tobacco warehousemen for handling and selling leaf tobacco, was sustained. The case involved *intrastate* transactions exclusively, and therefore presented no question under the commerce clause. Furthermore, the Georgia statute was found not to have been in conflict with any Federal legislation. The Court distinguished cases involving interstate commerce. There can be no question that the operations of Ziffrin, Inc., constitute interstate commerce, and it would seem clear that the Control Law is in conflict with Federal legislation occupying the field.

SLIGH v. KIRKWOOD,
237 U. S. 52, 59 L. Ed. 835 (R. 54).

This case has been distinguished, *ante,* p. 25.

BOWMAN v. *CHICAGO, N. W. R. R. CO.* and *LEISY* v. *HARDIN* (R. 56, 57), have been mentioned earlier (*ante,* pp. 36 and 55). They possess no tendency to show the judgment below to be correct: their reasoning and decisions inevitably lead to the contrary conclusion.

Nowhere in its Opinion did the Court below attempt to distinguish any of the cases upon which we then relied, and now rely. It rested its decision upon the cases cited in this section of this brief, and to a considerable extent, it seems, upon *Commonwealth* v.

One Dodge, supra. Not one of the cases cited in the Opinion holds, *or even intimates,* that it is within the power of Kentucky arbitrarily to destroy appellant's interstate business merely because appellant is a contract carrier.

ADDITIONAL CONSIDERATIONS.

The Court below *did not* deny injunctive relief because it conceived (a) that the requisite jurisdictional amount is not in controversy, or, (b) that the action was brought prematurely, or, (c) that the appellant's remedy at law is adequate. However, both in the Court below and heretofore upon this appeal, appellees have contended that the appellant's legal remedy is adequate, and we anticipate that contention will be renewed. Furthermore, upon an appeal from a decree dismissing a bill the scope of inquiry is so broad that we deem it incumbent briefly to discuss the suggested elements even though they were not made grounds of the decision and judgment sought to be reversed.

(K) The Requisite Jurisdictional Amount Is in Controversy.

The complaint as amended shows that enforcement of the Control Law, and even the threat of enforcement thereof, will destroy appellant's business of transporting export consignments of whiskies from Kentucky in interstate commerce, and that such destruction would damage appellant in a sum and amount exceed-

ing $75,000.00 (*ante* pp. 12, 13). From the complaint, like from that involved in *Puckard* v. *Banton*, 264 U. S. 140, 68 L. Ed. 596,

> "* * * it sufficiently appears that *the value of the right of appellant to carry on his business, freed from the restraint of the statute, exceeds the jurisdictional amount.*" (Italics ours.)

In *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543, 50 L. Ed. 1142, one of the questions presented was whether the record disclosed that the matter in dispute exceeded, exclusive of interest and costs, the sum and value of $2,000.00, which at that time was the jurisdictional minimum. In sustaining the jurisdiction the Court said in part:

> "* * * there is involved in the controversy presented by the bill *not only* the right to enforce against the railway company *the payment of statutory penalties much in excess of $2,000.00, but also the right of that company to carry on interstate commerce in North Carolina without becoming subject to such orders and directions of the corporation commission which so directly burden such commerce as to amount to a regulation thereof. This latter right is alleged in the bill to be of the necessary jurisdictional value,* the averment was supported by testimony and the master and the court below have found such to be the fact. *There is no merit in the contention that there is a want of jurisdiction to entertain the writ of error.*" (Italics ours.)

GIBBS v. BUCK,
—— U. S. —— (decided April 17, 1939),
reaffirms the principle.

(L) The Action Was Not Prematurely Brought.

The complaint as amended shows the Control Law's licensing provisions to have been in effect, and irreparable injuries to have been immediately and certainly impending when the suit was brought. It, of course, is not needful to await the actual happening of threatened injury in order to obtain injunctive relief (*Pennsylvania* v. *West Virginia*, 262 U. S. 553, 67 L. Ed. 1117; reaffirmed on petition for rehearing, 263 U. S. 350, 67 L. Ed. 1144; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070; *Gibbs* v. *Buck, supra.*)

(M) Appellant Has No Adequate Remedy at Law.

The facts showing the inadequacy of appellant's remedy at law have been marshaled for use in another connection (*ante*, pp. 12, 13, 40, 41, 87-90). The inadequacy of appellant's remedy at law has been discussed at length at pp. 5-14 of the printed brief heretofore filed herein for appellant upon appellees' motion opposing appellant's Jurisdictional Statement. We shall not unduly extend this brief by repeating the facts and reiterating the argument, believing that it will suffice presently to say:

(a) Prevention of the numerous and vexatious prosecutions threatened under the Control Law was, and is, essential to safeguard appellant's property rights in its established and profitable business;

(b) A long, unbroken line of decisions holds that equitable jurisdiction exists to restrain criminal prose-

cutions threatened under unconstitutional statutes when the prevention of such prosecutions is essential to safeguard rights of property (*Truax* v. *Raich*, 239 U. S. 33, 60 L. Ed. 131; *Adams* v. *Tanner*, 244 U. S. 590, 61 L. Ed. 1336; *Kennington* v. *Palmer*, 255 U. S. 100, 65 L. Ed. 528; *Terrace* v. *Thompson*, 263 U. S. 197, 68 L. Ed. 255; *Packard* v. *Banton*, 264 U. S. 140, 68 L. Ed. 596; *Hy-Grade Provision Co.* v. *Sherman*, 266 U. S. 497, 69 L. Ed. 402; *Tyson & Bro.* v. *Banton*, 271 U. S. 418, 71 L. Ed. 718; *Gibbs* v. *Buck, supra*); and

(c) The mentioned rule uniformly has been applied in preventing the enforcement of the penal and criminal provisions of unconstitutional statutes governing motor carriers (*Michigan Public Util. Comm.* v. *Duke*, 266 U. S. 570, 69 L. Ed. 445; *Buck* v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623; *Bush & Sons Co.* v. *Maloy*, 267 U. S. 317, 69 L. Ed. 627, and *Allen* v. *Galveston Truck Line Corp.*, 289 U. S. 708, 77 L. Ed. 1463).

CONCLUSION.

In admitting common carriers by motor vehicle to engage in the business of transporting liquors and in declaring them eligible to procure a Transporter's License upon the execution of a nominal bond, and simultaneously, and under threat and intimidation of coercive penalties, in denying plaintiff, in its character of a contract motor carrier, the right to engage in its established business of hauling exports of whiskies from Kentucky in interstate commerce on any terms

whatever, the Kentucky Legislature has established an indefensible classification which merits being stigmatized and denounced as arbitrary, discriminatory and confiscatory. The Control Law, as written and as defendants threaten to enforce the same—under penalties of self-destructive severity—prohibits plaintiff from continuing to conduct its business unless plaintiff converts itself into a common carrier, assumes the added burdens and the more strict liabilities of that class of carrier, and unless plaintiff proves itself to be entitled to and obtains a certificate of public convenience and necessity from Kentucky authorities, and unless plaintiff—of resulting necessity—renounces its existing special contracts and thereby abandons the precise business it would preserve. We shall not extend this brief by discussing—but pause merely to suggest—the confusion which would be produced in plaintiff's affairs and the uncertainty in which its status would be enshrouded before the motor carriers' governing bodies in Indiana and Illinois, and before the Interstate Commerce Commission—all of which know plaintiff as a contract carrier—if plaintiff were to allow itself to be bludgeoned into the shape of a common carrier in Kentucky. Repeatedly—advancing cogent reasons which still obtain—the Court has held that state legislation assuming to require conversion of a contract carrier into a common carrier, as the price of continuance of business, constitutes a taking of property without due process. A state legislature cannot levy such tribute; a contract carrier cannot be pressed so to mutilate and maim itself.

Separable and distinct from its infirmities under the 14th Amendment, but superimposed thereon and cumulative thereto, is the vice of the Control Law's repugnancy to the Commerce Clause and its direct and substantial conflict with Motor Carrier Act, 1935, with which plaintiff has complied, and which expressly authorizes interstate operations by contract carriers in the interstate transportation of "property," and all legitimate subjects of trade and commerce, among which are to be included intoxicating liquors in export. There can be no serious question in the case at bar whether the burdens imposed upon commerce by the Control Law are direct or indirect, or whether they are substantial or incidental. The burdens consist in absolute and complete prohibition and exclusion, which necessarily constitute Constitutionally forbidden obstructions of and impediments upon interstate commerce.

Insofar as the plaintiff's export operations are concerned, the Control Law is in inevitable, direct and substantial conflict with the Commerce Clause and Motor Carrier Act, 1935. It was held, typically, in *Kansas City, Etc., R. R. Company* v. *Kaw Valley Drainage Dist.*, 233 U. S. 75, 58 L. Ed. 857, that as between the states and the National Government there can be no divided authority over interstate commerce, and the Court found occasion somewhat pungently to observe:

> "The decisions also show that a state cannot avoid the operation of this rule by simply invoking the *convenient apologetics of the police power.*" (Italics ours.)

With respect to interstate commerce, the powers of the National Government are exclusive and supreme, and the police power cannot be manipulated to create an exception, for so to do—

> "* * * *would be to eat up the rule under the guise of an exception.*" (*Baldwin* v. *Seelig, supra,* Italics ours).

The protection afforded by the National Government to plaintiff's interstate operations is not confined to operations upon the State's boundary lines (be they mathematical survey lines or natural monuments), but accompanies, and convoys, the plaintiff's operations into the interior of Kentucky (*Gibbons* v. *Ogden, supra; Brown* v. *Maryland,* 12 Wheat. 419, 6 L. Ed. 678; *Dahnke-Walker Milling Co.* v. *Bondurant, supra; Bowman* v. *Chicago, Etc., R. R. Co., supra; Leisy* v. *Hardin, supra; L. & N. R. R. Co.* v. *F. W. Cook Brewing Co.,* 223 U. S. 70, 56 L. Ed. 355; *Kirmeyer* v. *Kansas,* 236 U. S. 568, 59 L. Ed. 721; *Mich. Pub. Util. Comm.* v. *Duke, supra; Buck* v. *Kuykendall, supra; Bush & Sons Company* v. *Maloy, supra; Allen* v. *Galveston Truck Line Corp., supra; Lemke* v. *Farmers Grain Company, supra,* and *The Daniel Ball, supra*). It protects not only the interstate operations themselves, but protects also the instrumentalities by which that commerce is conducted. It protects as against seizure and confiscation not only plaintiff's consigned cargoes, but plaintiff's automotive equipment, as well (*Gloucester Ferry Co.* v. *Penn.,* 114 U. S. 196, 29 L. Ed. 158; *Covington, Etc., Bridge Co.* v. *Kentucky,* 154

U. S. 204, 38 L. Ed. 962, and *West* v. *Kansas Natural Gas Co., supra*).

That conformably with Kentucky statutes, state administrative, quasi-judicial departments have denied plaintiff a common carrier's certificate and a liquor Transporter's License does not conclude the matter:

> "We shall never immolate truth, justice and the law, because a state tribunal has erected the altar and decreed the sacrifice." (Gelpcke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520.)

Appellant pursued its possible administrative remedies to exhaustion and without avail, to satisfaction of the rule of *Natural Gas Pipe Line Co.* v. *Slattery*, 302 U. S. 300, 82 L. Ed. 276, and appellant is remediless at law.

We accordingly believe that palpable, and numerous, errors were committed by the District Court in adjudging the Control Law to be constitutional with respect to plaintiff and plaintiff's interstate export business; that the Court below erred in dissolving the restraining order, in denying plaintiff a preliminary injunction, and in dismissing the complaint as amended; that the orders and decrees appealed from should be reversed, and the cause remanded, with such directions to the District Court below as are usual in such cases and with the further direction that the Court below grant plaintiff an appropriate injunction pending further proceedings, as was directed in *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 72 L. Ed. 218.

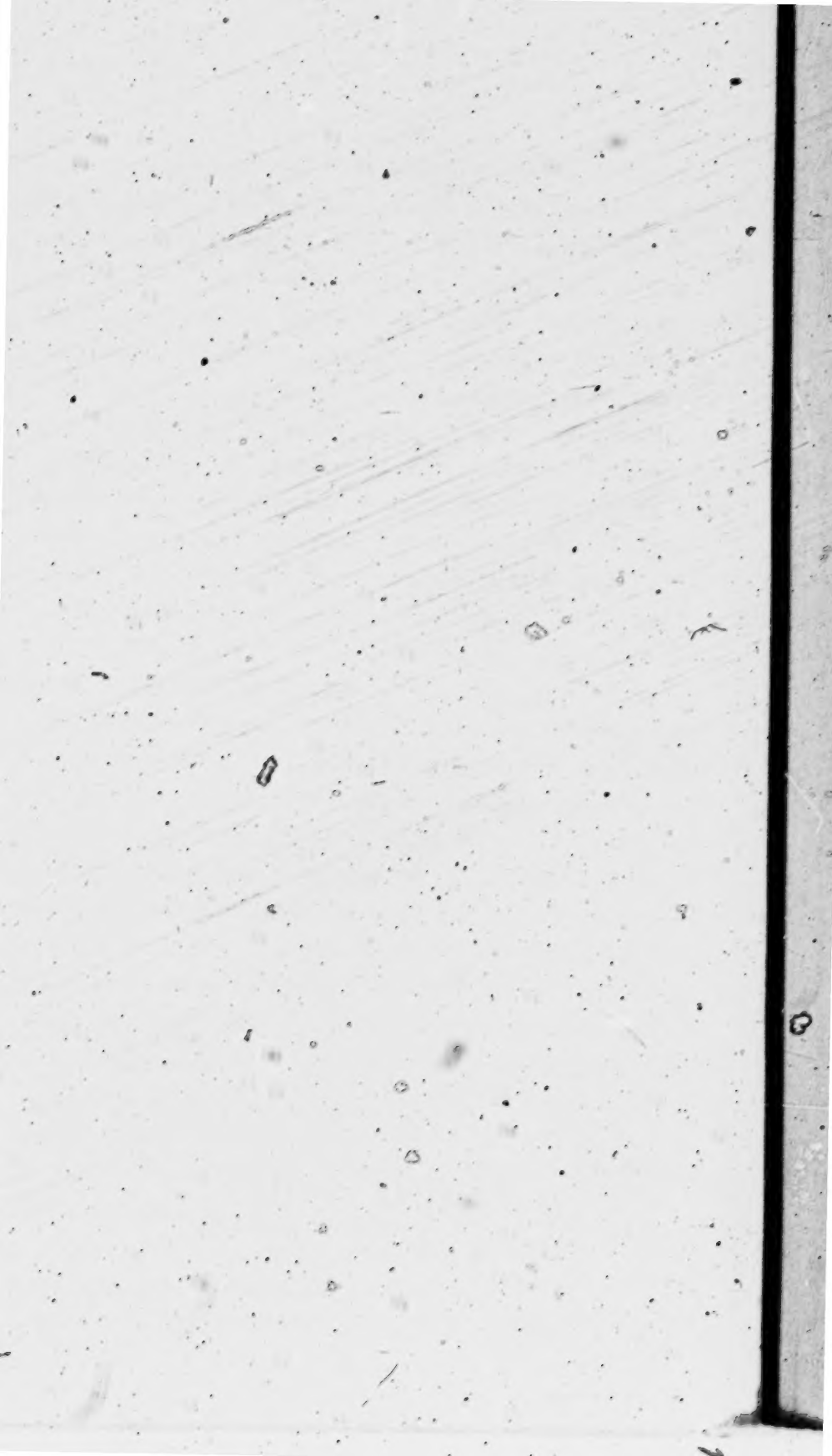
That such should be the determination of this appeal is not urged upon the basis of *stare decisis*, but on the ground that the reasons underlying the cited de-

cisions relied upon herein are eminently sound, that the commerce of the Nation—so intimately associated with the Nation's welfare—still requires to be protected against the imposition by the states of restrictions and prohibitions, still needs to be safeguarded against discrimination, retaliatory action, disruption and ultimate destruction. If an act, such as the Control Law, is sustainable, our system of Federalism and dual sovereignty is ended, and the era of state autarchy, and its blight, are imminent. National protection of interstate commerce is indispensable if the more perfect union, by the Constitution sought to be accomplished, is to be maintained and perpetuated. (*Gibbons* v. *Ogden, supra; Wabash, Etc., R. R. Co.* v. *Illinois,* 118 U. S. 557, 30 L. Ed. 244; *Pennsylvania* v. *West Virginia, supra.*) The not altogether happy history of our Country under the Article of Confederation (which, it will be remembered, contained no equivalent of the Commerce Clause) adjures staunch adherence to the guaranties so wisely provided, and unflagging, unremitting vigilance in protecting the Nation's commerce from hostile interference by the states, to the end that in the matter of the Nation's commerce, and in all that to it appertains, there be achieved the envisioned destiny—

> "* * * a single nation—one and the same people." (Pa. v. W. Va., *supra.*)

Respectfully submitted,

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HOWELL ELLIS,
Counsel for Ziffrin, Incorporated, Appellant.



APPENDIX.

APPENDIX.

PERTINENT PROVISIONS OF: ALCOHOLIC BEVERAGE CONTROL LAW OF KENTUCKY,

(Being Chapter 2, pages 48, et seq., of 1938 Session Acts of General Assembly of the Commonwealth of Kentucky, approved and effective March 7, 1938, and being Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, Sec. 2554b-97, et seq., pages 175, et seq.)

"§1. SHORT TITLE. This Act shall be known and may be cited and referred to as the 'Alcoholic Beverage Control Law.'"

"§2.

"(1) 'Alcohol' means and includes ethyl alcohol, hydrated oxide of ethyl or spirit of wine, from whatever source or by whatever process produced.

"(2) 'Alcoholic Beverage' or 'Beverage' means and includes alcoholic spirits, liquor, rum, wine, beer, ale, porter, stout, and every liquid or solid patented or not, containing alcohol in an amount in excess of that now permitted or that may hereafter be permitted under Chapter I of the Acts of the General Assembly of 1936, known as the Local Option Law, or any amendment thereof, and capable of being consumed by a human being and every spurious or imitation liquor sold as, or under any name commonly used for alcoholic beverages, whether containing any alcohol or not. Provided that there is excepted from this definition of alcoholic beverages the following products if they are unfit for use for beverage purposes: (a) medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia, national formulary or the American Institute of Homeopathy; (b) patented, patent and proprietary medicines; (c) toilet, medicinal and antiseptic preparations and solutions; and (d) flavoring extracts and syrups.

"(4) 'Board' or 'State Board' or similar abbreviation used herein means the Kentucky State Alcoholic Beverage Control Board created by this Act.

"(10) 'Commissioner' means the Commissioner of Revenue of the Commonwealth of Kentucky.

"(12) 'Department' means the Department of Revenue of the Commonwealth of Kentucky.

"(16) 'Field Representative' means and includes all employees or agents of the Department of Revenue who are regularly employed and whose primary function is to travel from place to place for the purpose of visiting taxpayers and all employees or agents of said Department who may be assigned, temporarily or permanently, by the Commissioner to duty outside of the main office of the Department at Frankfort, in connection with the administration of this Act.

"(17) 'License' means and includes any license issued pursuant to this Act.

"(18) 'Licensee' means and includes any person to whom a license has been issued pursuant to this Act.

"(19) 'Liquor' means and includes all alcoholic beverages.

"(22) 'Person' means and includes individual, partnership, joint stock company, business, trust, association, corporation or other form of business enterprise, including a receiver, trustee or liquidating agent.

"(28) 'Spirits' or 'Distilled Spirits' means and includes any product capable of being consumed by a human being which contains alcohol in excess of the amount now permitted or that may hereafter be permitted by Chapter I of the Acts of the General Assembly of 1936, known as the Local Option Law, or any amendment thereof, obtained by distilling, mixed with water or other substances in solution, except wine as herein defined."

"§3. FUNCTIONS. The administration of this Act and the regulation of the traffic in alcoholic beverages in this

Commonwealth is hereby vested in the Department of Revenue."

"§4. ORGANIZATION. (a) The administration of this Act in relation to traffic in distilled spirits and wine shall be in charge of a distilled spirits unit, under the supervision of the Commissioner of Revenue. (b) The administration of this Act in relation to traffic in malt beverages shall be in charge of a malt beverage unit, under the supervision of the Commissioner of Revenue."

"§5. ADMINISTRATORS; SALARIES. The distilled spirits unit and the malt beverage unit shall each be headed by an Administrator appointed by the Commissioner of Revenue. The salaries of said Administrators shall be fixed by the Commissioner of Revenue in accordance with Section 4618-154 (Reorganization Bill) of Carroll's Kentucky Statutes, 1936 edition, and they shall be exempt from the test provided for in Section 4618-90 (Reorganization Bill) of Carroll's Kentucky Statutes, 1936 edition."

"§6. POWERS AND DUTIES OF ADMINISTRATORS. The Administrators, subject to the supervision and control of the Commissioner, shall exercise severally any of the functions, powers and duties conferred upon the Department by law, which the Commissioner may delegate to them. The Administrator of the distilled spirits unit shall have authority to issue or refuse to issue any license provided for in this Act authorizing traffic in distilled spirits and wine; and the Administrator of the malt beverage unit shall have authority to issue or refuse to issue any license provided for in this Act authorizing traffic in malt beverages."

"§7. ALCOHOLIC BEVERAGE CONTROL BOARD; CREATION; FUNCTIONS; LIMITATIONS. The Kentucky Tax Commission shall constitute the Alcoholic Beverage Control Board, which shall have the following functions, powers and duties:

"(1) To adopt reasonable regulations governing the conduct of its own business and the procedure relative to applications for and revocations of licenses and relative to all other matters over which the Board is given jurisdiction by this Act, and for the supervision and control of the manufacture, sale, transportation, storage, advertising, and trafficking of alcoholic beverages throughout the Commonwealth. Such rules and regulations need not be uniform in their application, but may vary in accordance with reasonable classifications.

"(2) To limit in its sound discretion the number of licenses of each kind or class to be issued in this Commonwealth or within any political subdivision thereof, and to restrict the locations of licensed premises. To this end the Board may divide and subdivide this Commonwealth or any political subdivision thereof into sections or districts, provided the classification be reasonable, and the rules and regulations relating to the granting, refusal and revocation of licenses may be different within the several divisions or subdivisions so created." • • •

"§9. Powers of Members, Officers and Employees. The Administrators and all Field Representatives shall have full police powers such as are now vested in sheriffs and other peace officers, provided the jurisdiction of said Administrators and Field Representatives shall be coextensive with the boundaries of the Commonwealth. They shall have authority to inspect or examine any premises where alcoholic beverages are manufactured, sold, stored or otherwise trafficked in, without first having obtained a search warrant; and shall have authority to confiscate any contraband property."

"§13. Legal Counsel for Board. The Attorney General of this Commonwealth shall, subject to the approval of the Commissioner of Revenue, appoint an additional assistant Attorney General whose sole duty shall be to act as legal counsel for the distilled spirits unit and the malt beverage unit. The Assistant Attorney General appointed

under this section shall be paid from the Department of Revenue appropriation, an annual salary not to exceed four thousand dollars."

"§18. EXPIRATION DATE OF LICENSES; LICENSE TAXES. All licenses issued under this Act shall expire on June 30th of each year. There shall be the following kinds of licenses, each of which shall be printed so as to be readily distinguishable from each other, to wit: * * *

"(7) License to transport distilled spirits and wine to or from any point in Kentucky, the fee for which shall be $10 per annum."

"§27. BUSINESS AUTHORIZED UNDER A TRANSPORTER'S LICENSE. A Transporter's License shall authorize the holder to transport distilled spirits and wine to or from the licensed premises of any licensee under this Act, provided both the consignor and consignee in each case are authorized by law of the states of their residence, respectively, to sell, purchase, ship, or receive the alcoholic beverages, as the case may be."

"§33. APPLICATIONS FOR LICENSES; ISSUANCE OF SAME. Applications for any license provided for in section 18 of this Act shall be made to the Administrator of the Distilled Spirits Unit at his office in Frankfort, Kentucky; shall be in writing on forms furnished by the Department of Revenue, and verified; and shall set forth in detail such information concerning the applicant and the premises for which the license is sought as this Act or the State Board shall by regulation require. Said application shall be accompanied by a certified check, or cash, or a postal or express money order for the amount of money required by this Act for a license of the kind applied for. If the Administrator shall grant the application he shall issue the proper license in such form as shall be determined by the State Board by regulation, subject to the provisions of section 38 of this Act. No license except those provided in subsections 6 and 8 of section 29 of this Act shall be

issued in less than twenty days or delivered in less than thirty days from the time the application and remittances were received by the Department of Revenue."

"§49. JUDICIAL REVIEW OF ORDER OF BOARD; PARTIES AND PROCEDURE; COSTS. Any order of the Alcoholic Beverage Board refusing a license or revoking or suspending a license may be appealed from by the applicant or licensee, as the case may be, and any order of said Board granting a license or refusing to revoke or suspend a license may be appealed from by any citizen feeling himself aggrieved. The party aggrieved may, within ten days after the entry of the order with which he is dissatisfied, file in the office of the Clerk of the Franklin Circuit Court an attested copy of the order, of all the evidence heard, and of all the steps taken by the said Board relative to the order being contested, provided he shall first post a bond to secure the costs of that action in such sum as may be approved by the Circuit Court, with a corporate surety approved by the Division of Insurance of the Department of Business Regulation as to solvency and responsibility and authorized to transact business in this Commonwealth. The State Board and the licensee or applicant shall be necessary parties to all such appeals. The Circuit Court Clerk shall thereupon docket the case as though it were a petition in equity, and shall immediately issue a summons for said State Board, if the appeal be taken by an applicant or licensee, or a summons for said State Board and the licensee if the appeal be prosecuted by a citizen. Such summons shall be returnable in the same manner as are summonses in equity cases. If the appeal be from an order refusing to grant a license or revoking or suspending a license, it shall be the duty of the State Board, when served with such summons, or of such person as it may designate, to appear and defend the action of the State Alcoholic Beverage Board in refusing to grant or in revoking the license in question. If the appeal be from an order granting a license or refusing to revoke or suspend a license the burden of appear-

ing and defending the action of said Board shall be upon the licensee.

"No formal pleading shall be required in such appeals, but the case shall be set down by the court for as early a day as possible for a hearing, and such appeals shall in all respects to be expedited as are declaratory judgment suits; after such hearing the court shall enter a judgment sustaining or setting aside the order of the State Alcoholic Beverage Control Board appealed from. No new or additional evidence may be introduced in the Circuit Court except as to the fraud or misconduct of some party engaged in the administration of this Act and affecting the order appealed from, but the Circuit Court shall otherwise hear the case upon the record as attested by the Board, and shall in all respects dispose of the appeal in a summary manner, its review being limited to determining whether or not:

"(1) The Board acted without or in excess of its powers.

"(2) The order appealed from was procured by fraud.

"(3) If questions of fact are in issue, whether or not any substantial evidence supports the order appealed from.

"Any party aggrieved by a judgment of the Circuit Court may appeal to the Court of Appeals in the same manner that appeals are taken under the declaratory judgment act.

"If the appeal be from an order refusing to grant a license, or revoking or suspending a license, the costs shall be taxed against the applicant or licensee in any event. If the appeal be from an order granting a license or refusing to revoke or suspend a license, the costs shall be taxed against the citizen who, feeling himself aggrieved, has contested the order, in the event that the order of the Board granting the license or refusing to revoke or suspend the license, is sustained. In the event that such order is set aside with direction to the Board to refuse the license or to revoke or suspend the license, the costs shall be taxed against the licensee.

"No order granting a license shall become effective, and no license thereunder shall be issued, until the expiration of ten days after the date of the entry of such order; and if, within said period of ten days, an appeal from said order shall have been filed as provided by this section, then such order shall not become effective until said appeal shall have been finally determined.

"If a license shall be revoked or suspended by an order of the Board, the licensee shall at once suspend all business or other operations authorized under his license, except as provided in section 46 of this Act, though he may file an appeal in the Circuit Court from the order of revocation or suspension, and no court shall have authority to issue an injunction to suspend the operation of an order of revocation or suspension pending an appeal. If upon appeal to the Circuit Court an order of suspension or revocation is upheld, or if an order refusing to suspend or revoke a license is reversed, and an appeal is taken to the Court of Appeals, no court shall have authority to issue an injunction to suspend the operation of the judgment of the Circuit Court pending the appeal."

"§52. No Traffic in Alcoholic Beverages Save Under License. It shall be a criminal offense for any person to manufacture, store, sell, purchase, transport or otherwise in any manner traffic in alcoholic beverages as that term is defined in this Act, without first having paid to the Department of Revenue at its office in Frankfort, the license tax required by this Act, and without first having obtained the license required by this Act.

"In addition to the criminal penalty prescribed for violation of this section, it is explicitly provided that, as often as any person shall manufacture, store, sell, purchase, transport, or otherwise traffic in alcoholic beverages without first having paid to the Department of Revenue at its office in Frankfort the license tax required by this Act, said person shall be required to pay said license for the full year notwithstanding that no license shall be issued,

together with a penalty equal to twenty (20) per cent of said license tax."

"§53. DECLARING CERTAIN PROPERTY CONTRABAND; PROVIDING FOR ITS DISPOSITION. The following property is hereby declared to be contraband; * * *

"(2) Any spirituous, vinous or malt liquors in the possession of any one not entitled to possession of the same under the provisions of this Act.

* * * * *

"(6) Any motor vehicle, water or air craft, or other vehicle in which any person is illegally possessing or transporting alcoholic beverages.

"Any peace officers, including the Administrators, and field representatives of the Department of Revenue are hereby authorized to seize, without warrant, any of the property declared to be contraband under this section and to hold the same subject to the order of the court before which the owner or one in possession of such property has been arraigned. Upon conviction of the defendant the court shall enter an order vesting title in all the contraband property in the Alcoholic Control Board, subject to the right of any owner or lienor of property in subsection six above, whose lien is of record to intervene and establish his rights in such property by providing that the property was being used in connection with traffic in alcohol beverages without the knowledge, consent or approval of such owner or lienor. If the owner of the property does so prove, the court shall order the property restored to such owner. If the lienor so proves the court shall order a sale of the property at public auction. The expenses of keeping and selling the same, and of all valid recorded liens which are established by intervention as being *bona fide* shall be paid out of the proceeds of the sale. The balance shall be paid into the State Treasury and be credited to the General Expenditure Fund. The Court shall order all sales under this Act in which lienors have

an interest to be made by the sheriff who shall receive and be allowed the same fees as allowed for sales under execution. If the defendant be acquitted no property seized as contraband in connection with the arrest of the defendant shall be ordered returned or restored unless the person from whose possession same was taken proves that he was in lawful possession of said property. If the owners of any contraband seized under this Act cannot be located within ninety days, and during that time shall fail to appear and claim such contraband, or if such owner appears and agrees, title to such contraband shall immediately vest in the State Alcoholic Control Board."

"§54. (7) A Transporter's License as provided for in section 18 (7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier."

"§89. TRANSPORTATION BY NON-LICENSEE PROHIBITED; EXCEPTION. No person except a railroad company or railway express company shall transport or cause to be transported any distilled spirits or wine, otherwise than as provided in this Act, except such beverages may be transported by the holder of any license authorized by section 18 of this Act, from and to express or freight depots to and from the premises covered by the license of the person so transporting distilled spirits or wine."

"§94. PENALTIES FOR TRAFFICKING IN ALCOHOLIC BEVERAGES WITHOUT A LICENSE. Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of section 52 of this Act, shall be deemed guilty of a crime and, upon conviction, shall be punished by a fine of not less than $100.00 and not to exceed $5,000.00 or by imprisonment not to exceed five years, or by both such fine and imprisonment. For a second and each subsequent offense the offender, upon conviction, may be fined in a sum not less than $500.00 and not to exceed

$10,000.00 or imprisoned for a term not to exceed ten years, or both so fined and imprisoned; provided, that in case the offender be a corporation, joint stock company, association or fiduciary, then the principal officer and/or the officer or officers responsible for such violation may be punished by such imprisonment."

"§95. PENALTIES FOR VIOLATIONS OF OTHER SECTIONS OF THIS ACT. Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of any section of this Act other than section 52 or sections 104 to 117 inclusive, for which a specific penalty is not provided, shall, for the first offense be deemed guilty of a misdemeanor and, upon conviction thereof, be punished by a fine not to exceed $500.00 or by imprisonment in the County jail or workhouse for a term not to exceed six months, or by both such fine and imprisonment. For a second and each subsequent violation of the provisions of any section of this Act other than section 52, whether the section violated be that for which the first conviction was had or not, the offender, upon conviction, shall be punished by a fine not to exceed $1,000 or by imprisonment for a term not to exceed one year, or by both such fine and imprisonment. The penalties provided for in this section shall be in addition to the revocation of the offender's license; provided, that in case the offender be a corporation, joint stock company, association or fiduciary, then the principal officer or officers responsible for such violation may be punished by such imprisonment. Nothing in this section shall be construed as conflicting with the penal provisions of section 10 of this Act."

"§119. TRANSFER OF FUNCTIONS AND RESOURCES OF DIVISION OF ALCOHOLIC CONTROL FROM THE DEPARTMENT OF BUSINESS REGULATION TO THE DEPARTMENT OF REVENUE. The functions of the Division of Alcoholic Control of the Department of Business Regulation are hereby transferred to the Department of Revenue. All books, papers, records, files, office equipment, other property and pending busi-

ness of the said division are likewise transferred to and vested in the Department of Revenue. All employees whose functions are by this Act transferred to and vested in the Department of Revenue are hereby transferred, with their functions, to the said department. The remainder of the appropriation made for the operation of the Division of Alcoholic Control is hereby transferred to and vested in the Department of Revenue to be used for the administration of this Act. In connection with the transfer of the functions of the Division of Alcoholic Control of the Department of Business Regulation to the Department of Revenue, the said Department of Revenue shall be in every way the successor with respect to such functions, and to every act done in the exercise of such functions by or under the authority of the said division. In every instance in which the said division is referred to or designated in any law (not hereby repealed), contract or document, such reference or designation shall be deemed to refer to the Department of Revenue."

"§123. Declaring an Emergency. The present uncertainty with respect to the law governing the sale, distribution and use of alcoholic beverages constitutes an emergency, and this Act shall become a law and be effective on its passage and approval by the Governor. Provided, however, that section 70 of this Act shall become effective as provided by the Constitution of Kentucky in the absence of a declaration of emergency; and provided further, that nothing in this Act shall be construed to require any licensee engaged in traffic in alcoholic beverages to pay any additional license tax, or procure any license hereunder, prior to the procurement of the license for the fiscal year 1938-39."

PERTINENT PROVISIONS OF: KENTUCKY MOTOR VEHICLE TRANSPORTATION ACT OF 1932, AS AMENDED,

(Being Chapter 104, pages 514, et seq., of 1932 Session Acts of General Assembly of the Commonwealth of Kentucky, approved March 17, 1932, and being Carroll's Kentucky Statutes, 1936 Edition, Sections 2739j-42, et seq., pages 1457, et seq., as amended by Session Acts of General Assembly of the Commonwealth of Kentucky, 1936 Fourth Extraordinary Session, Chapter 9, pages 105, et seq., approved January 18, 1937, effective April 17, 1937, and being Section 2739j-42 of Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, pages 239, et seq.)

"§2739j-42. DEFINITIONS. (a) 'Motor Vehicle' means any motor propelled vehicle, not usually operated over or on rails, or not propelled by electric power obtained from overhead wires, while being operated within any municipality or where said vehicles do not travel more than five (5) miles beyond the limit of any municipality, used for the transportation on the public highways of this State of persons or property for hire, and shall include any such vehicle operated as a unit in combination with other vehicles for any such purpose;

"(b) 'Operator' means any person, firm, partnership, association, joint stock company, corporation, lessee, trustee, or receiver, appointed by any court whatsoever owning, controlling, operating or managing any motor vehicle used for the transportation of persons or property for hire;

"(c) 'Common Carrier' means any operator of a motor vehicle for hire in common carriage;

"(d) 'Contract Carrier' means any operator of a motor vehicle for hire other than a common carrier. 'Contract carrier' shall not be construed to mean or include any person, firm or corporation who transports only his own property, or who does not engage in the transportation

business but makes occasional or casual trips to transport persons or the property of others for hire;

"(e) 'Public Highway' means every public street, alley, road or highway in this State, whether within or without the corporate limits of any municipality;

"(f) 'Certificate' means the certificate of public convenience and necessity authorized to be issued under the provisions of this Act;

"(g) 'Permit' means the permit to operate authorized to be issued under the provisions of this Act;

"(h) 'Commission' means the State Tax Commission of Kentucky."

"§2739j-45. CERTIFICATE NECESSARY. No common carrier shall operate any motor vehicle for hire for the transportation of persons or property on any public highway in this State without having obtained a certificate from the Commission."

"§2739j-46. APPLICATION FOR CERTIFICATE, FORM, OATH. Every application for a certificate shall be made in such form and contain such matters as the Commission may prescribe, and shall be made under oath, signed by the applicant; or, if the applicant be not a person, then by a person having knowledge of the matters therein set forth and duly designated for that purpose by the applicant."

"§2739j-47. GRANTING CERTIFICATES, PROCEDURE. Upon the filing of any such application and the payment of the fee hereinafter prescribed, the Commission shall, within a reasonable time, fix the time and place for a hearing thereof. A written notice of such hearing, and of the right to file a protest in accordance with said Commission's requirements, shall be mailed by said Commission at least ten (10) days before the hearing of such application to the applicant, to all common carriers (including steam and electric railway companies) serving any part of the route to be served by the applicant, to the Chairman of the State Highway Commission, to the county attorney and county

judge of each county in which the applicant proposes to render service, and to any other person, firm or corporation who may, in the opinion of the Commission, be interested in or affected by the issuance of said certificate."

"§2739j-48. HEARING; PROTESTS MAY BE FILED. At the time fixed in such notice, or at such time thereafter as the Commission may determine, a public hearing upon said application shall be held by said Commission. Any person, firm or corporation having an interest in the subject matter shall have the right, in accordance with the rules and regulations prescribed therefor by said Commission, to file a protest to the granting, in whole or in part of said application, to make representations, and to introduce evidence in support of said protest.",

"§2739j-49. ISSUING CERTIFICATE; CONDITIONS MAY BE ATTACHED; PUBLIC HEARING NOT NECESSARY, WHEN. After such hearing the Commission shall have the power to issue to the applicant a certificate, in the form to be prescribed by said Commission, declaring that the public convenience and necessity require the operation for which application is made, or refuse to issue the same, or to issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by such certificate such terms and conditions as, in its judgment, the public convenience and interest may require; provided, however, if no protest to the granting of the certificate be filed with said Commission prior to the date fixed for the hearing, and if said Commission is satisfied that the privilege sought by the applicant is convenient and necessary in the public interest the certificate may be granted without a public hearing."

"§2739j-50. MATTERS TO BE CONSIDERED IN GRANTING OR REFUSING CERTIFICATE. In granting or refusing to grant such certificate, the Commission shall take into consideration the effect that the proposed operation may have upon public transportation business and facilities of every char-

acter with the territory sought to be served by the applicant, the public need for the service the applicant proposes to render, the ability of the applicant efficiently to perform the service for which authority is requested, and the effect upon the highways and upon the safety of the public using such highways that will probably result from the granting of such application."

"§2739j-51. CONVENIENCE AND NECESSITY TO PUBLIC NECESSARY; PREFERENCE TO CERTAIN OPERATORS. No such certificate shall be issued until the applicant has established to the satisfaction of the Commission, upon consideration of the matters mentioned in the preceding section, that the privilege sought by the applicant is convenient and necessary in the public interest. If two or more operators who have been engaged in the transportation of property for compensation, before this act becomes effective, apply for a certificate authorizing them to perform substantially the same service in the same territory under similar conditions, and if the said Commission shall be of the opinion that, in accordance with the provisions of this Act, certificates should be granted to some but not all of such applicants, preference shall be given to the operator or operators who have been longest engaged in such service, provided such service has been rendered in accordance with the requirements of the law."

"§2739j-54. POWERS AND DUTIES OF COMMISSION. The Commission shall have the power and authority, by general order or otherwise, to prescribe rules and regulations governing common carriers; it shall have authority to fix or approve the rates, fares, charges, classifications, rules and regulations of each such common carrier, to regulate operating schedules so as to insure adequate and convenient transportation service, to prescribe a uniform system and classification of accounts to be used, to require the filing of annual and other reports, and to supervise and regulate such common carriers in all other matters in which the public interest is involved."

"§2739j-55. ABANDONMENT OR CHANGE OF ROUTE. No common carrier shall abandon or change any route or service without an order of the Commission that public convenience and necessity permit such abandonment or change. Applications for any such abandonment or change shall be made in accordance with the requirements of said Commission, and the procedure on an application for an abandonment or change of route shall be the same as herein provided for the issuance of a certificate; provided, however, if it becomes necessary on account of the condition of the roads or other emergency, temporary changes in route, service and schedules may be made."

"§2739j-56. RATES TO BE REASONABLE. Every rate demanded or received by any common carrier shall be just and reasonable."

"§2739j-57. ADEQUATE SERVICE TO BE FURNISHED. Every common carrier shall furnish adequate, efficient, safe and reasonable service."

"§2739j-58. SCHEDULE OF RATES, ETC., TO BE FILED; OPEN TO PUBLIC INSPECTION. Under such rules and regulations as the Commission may prescribe, every common carrier shall maintain on file with said Commission a schedule of the rates, fares, charges and classifications, if any, and a time schedule, if any, of all motor vehicles operated under the authority of said Commission, and shall keep open for public inspection at designated offices so much of said schedules, rates, fares, charges and classifications, as well as time schedules, as said Commission may deem necessary for public information."

"§2739j-59. REGULAR RATES TO BE CHARGED; REFUNDS NOT PERMITTED. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges specified in its tariffs and classifications filed with and approved by said Commission and in effect at the time; nor shall any company refund or remit in any

manner or by any device any portion of the rates, fares or charges so specified, nor make or give any unreasonable preference or advantage to any person; nor subject any person to any unreasonable prejudice or discrimination."

"§2739j-61. FIXING RATES. If the Commission, after a hearing held after reasonable notice upon its own motion or upon complaint, finds any existing rate or rates to be excessive, unreasonable or unjustly discriminatory, or the services rendered or the facilities employed by any common carrier to be unsafe, inadequate, inconvenient or in any wise in violation of law or the rules and regulations of said Commission, it may determine the just and reasonable rates to be charged thereafter, or the reasonable, safe, convenient and adequate service to be thereafter furnished, and shall fix the same by order; provided, however, that nothing in this Act shall be construed to require the Commission to fix the same rates for motor carriers subject to this Act as are or may be fixed for carriers engaged in other methods of transportation."

"§2739j-62. NECESSITY FOR REGULATION OF CONTRACT CARRIERS DECLARED. It is hereby declared that the business of contract carriers is affected with the public interest, and that the safety and welfare of the public, the preservation and maintenance of the public highways, and the integrity of the regulation of common carriers require the regulation of contract carriers to the extent hereinafter provided."

"§2739j-63. CONTRACT CARRIERS TO OBTAIN PERMITS. No contract carrier shall operate any motor vehicle for hire for the transportation of persons or property on any public highway in this State without having obtained a permit from the Commission."

"§2739j-64. APPLICATION FOR PERMIT, HEARING. Applications for permits shall be made in the manner and form provided for in the Commission's regulations and said Commission may, if it deems it advisable, require a public

hearing to be held thereon, and in this event it shall give written notice thereof to all persons who may, in the opinion of said Commission, be interested in or affected by the issuance of such permit at least ten days prior to the time fixed for such hearing."

"§2739j-65. ISSUING PERMIT. Upon the payment of fees hereinafter prescribed, the Commission shall have power to issue to the applicant a permit, in the form to be prescribed by said Commission, authorizing the operation for which application is made, provided the applicant has established to the satisfaction of said Commission that the privilege sought will not endanger the safety of the public or interfere with the public's use of the highways or impair the condition or maintenance of such highways."

"§2739j-86. APPEAL FROM DECISION OF COMMISSION, PETITION, SUMMONS TO ISSUE. When any application for a certificate or permit has been refused, the applicant shall have the right to appeal, or if the application is granted, any person who has filed a protest to the granting of such application shall have the right to appeal as hereinafter provided. The appellant may, within twenty (20) days after the rendition of the order of the Commission, file a petition of appeal with the Clerk of the Circuit Court of Franklin County. Such petition shall state completely the grounds upon which the review is sought, shall assign all errors relied on, and shall be accompanied by a copy of the record, certified by said Commission, or an abstract thereof if agreed to by all parties to the hearing before said Commission. The appellant shall furnish copies of the petition to each person who was a party to the hearing before said Commission. Summons shall be issued upon the petition, directing the adverse party or parties to file answer within fifteen (15) days after service thereof."

"§2739j-87. REVIEW BY CIRCUIT COURT. No new or additional evidence may be introduced in the Circuit Court except as to fraud or misconduct of some person engaged in the administration of this Act and affecting the order,

ruling or award, but the court shall otherwise hear the case upon the certified record or abstract thereof, and shall dispose of the case in summary manner, its review being limited to determining whether or not: One. The Commission acted without or in excess of its power; Two. The order, decision award was procured by fraud; Three. The order, decision or award is in conformity to the provisions of this Act; Four. The finding of facts in issue is supported by any substantial evidence."

"§2739j-88. REVIEW. PROCEEDINGS, PARTIES, JUDGMENT, REMANDING CASE; APPEAL TO COURT OF APPEALS. The Commission and each party shall have the right to appeal in such review proceedings. The Court shall enter judgment, confirming, modifying or setting aside the order, decision or award, or, in its discretion, remanding the case to the Commission for proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing of facts, remand the cause to said Commission. Any party may appeal from the decision of the Circuit Court to the Court of Appeals. Such appeals to the Court of Appeals shall have precedence of other cases pending."

"§2739j-94. EXEMPTIONS FROM ACT. There shall be exempted from the provisions of this Act: * * * Two. Motor vehicles for hire operating exclusively within the limits of a city or incorporated town, or within ten miles of its limits, Provided, however, that the operator of any such motor vehicle for the carriage of passengers, operating between any city or incorporated town and a point or points within ten (10) miles of the limits thereof, and over regular routes or between fixed termini, may apply to the commission for a Certificate. * * *."

"§2739j-95. ACT TO APPLY TO INTERSTATE COMMERCE. This Act and every part thereof shall apply and be construed to apply to interstate commerce, except insofar as the same may be in conflict with the provisions of the Constitution of the United States and the Acts of Congress."

PERTINENT PROVISIONS OF: 1936 GOVERNMENTAL REORGANIZATION ACT OF COMMONWEALTH OF KENTUCKY,

(Being c. 1, Art. XVI, Secs. 1, 2 and 3, pp. 32, 33, Acts of Extraordinary Session of General Assembly of Commonwealth of Kentucky, which commenced February 24, 1936; Carroll's Kentucky Statutes, Baldwin's 1936 Revision, Secs. 4618-113 to 4618-115, inclusive, pp. 2486, 2487.)

"§1. FUNCTIONS. The Department of Business Regulation shall have and exercise all the administrative functions of the State except as otherwise provided in this Act in relation to (a) the supervision of motor transportation for hire; (b) the regulation of the manufacture and sale of intoxicating liquors; (c) the supervision of banks and kindred financial institutions; (d) the regulation of insurance practices; and (e) the administration of examining functions for professional and semi-professional groups, except as provided herein.

"All functions heretofore vested by law in the Athletic Board of Control, the Department of Motor Transportation of the Department of Revenue and Taxation, the functions assigned by Chapter one hundred and forty-six (146), Acts of the General Assembly of 1934, to the State Tax Commission, the Department of Banking and Securities, the Department of Insurance, the Department of Health, insofar as are concerned with examining boards explicitly mentioned in this section are hereby transferred to and vested in the Department of Business Relation.

"§2. ORGANIZATION. The Department of Business Regulation shall be headed by a Commissioner of Business Regulation who shall be the Chairman of the Public Service Commission and shall be divided for administrative purposes into a division of motor transportation, a division of alcoholic control, a division of banking, a division of

securities, a division of insurance, and a division of professional standards. The heads of the divisions of said Department shall be appointed by the Governor.

"§3. DIVISION OF MOTOR TRANSPORTATION. The division of motor transportation, headed by a director, under supervision of the Commissioner of Business Regulation, shall have and exercise all the functions in relation to the regulation of motor vehicles for hire and of their operation, heretofore provided by law and assigned to the Department of Revenue and Taxation. The qualifications of the director of this division shall include four years experience in the work of motor vehicle regulation or equivalent experience."

PERTINENT PROVISIONS OF: "MOTOR CARRIER ACT, 1935,"

(Act of Cong. August 9, 1935, c. 498, 49 Stat. 543, et seq., as amended by Act of Cong. June 29, 1938, c. 811, 52 Stat. 1237, et seq.; U. S. C. A., Title 49, Secs. 301, et seq. Pocket Pamphlet Supplement, pages 69, et seq.)

"§301. SHORT TITLE. This chapter may be cited as the 'Motor Carrier Act, 1935.'

"§302. DECLARATION OF POLICY AND DELEGATION OF JURISDICTION TO INTERSTATE COMMERCE COMMISSION.

"(a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop

and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this chapter.

"(b) The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

"(c) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

"§303. DEFINITIONS AND EXCEPTIONS.

"(a) *Definitions.* As used in this chapter—

"(1) The term 'person' means any individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

"(2) The term 'board' or 'State board' means the commission, board, or official (by whatever name designated in the laws of a State) which, under the laws of any State in which any part of the service in interstate or foreign commerce regulated by this part is performed, has or may hereafter have jurisdiction to grant or approve certificates of public convenience and necessity or permits to motor carriers, or otherwise to regulate the business of transportation by motor vehicles, in intrastate commerce over the highways of such State.

"(3) The term 'Commission' means the Interstate Commerce Commission.

"(4) The term 'joint board' means any special board constituted as provided in section 305 of this chapter.

"(5) The term 'certificate' means a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle.

"(6) The term 'permit' means a permit issued under this chapter to contract carriers by motor vehicle.

"(7) The term 'license' means a license issued under this chapter to a broker.

"(8) The term 'State' means any of the several States and the District of Columbia.

"(9) The term 'express company' means any common carrier by express subject to the provisions of Chapter 1 of this title.

"(10) The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water.

"(11) The term 'foreign commerce' means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

"(12) The term 'highway' means the roads, highways, streets and ways in any State.

"(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not in-

clude any vehicle, locomotive, or car operated exclusively on a rail or rails.

"(14) The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of chapter 1 of this title.

"(15) The term 'contract carrier by motor vehicle' means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

"(16) The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

"(17) The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

"(18) The term 'broker' means any person not included in the term 'motor carrier' and not a *bona fide* employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this chapter, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise

as one who sells, provides, furnishes, contracts, or arranges for such transportation.

"(19) The 'services' and 'transportation' to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

"(20) The term 'interstate operation' means any operation in interstate commerce.

"(21) The term 'foreign operation' means any operation in foreign commerce. As amended June 29, 1938, c. 811, §2, 52 Stat. 1237.

"(b) *Vehicles Excepted from Operation of Law.* Nothing in this chapter, except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a *bona fide* taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owner or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secetary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or (4b) motor vehicles controlled and operated by a cooperative association as

defined in section 1141j of Title 12; or (5) trolley busses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service; or (6) motor vehicles used in carrying property consisting of livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation; or (7) motor vehicles used exclusively in the distribution of newspapers; or (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 302 of this chapter, shall the provisions of this chapter, except the provisions of section 304 of this chapter relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of such municipality or municipalities, except when such transportation is under a common control, management or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business."

"§304. POWERS AND DUTIES OF COMMISSION.

"(a) *Powers and Duties Generally.* It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

"(7) To inquire into the organization of motor carriers and brokers and into the management of their business, to keep itself informed as to the manner and method in which the same is conducted, and to transmit to Congress, from time to time, such recommendations as to additional legislation relating to such carriers or brokers as the Commission may deem necessary. (As amended June 29, 1938, c. 811, §4, 52 Stat. 1237.)"

"§306. CERTIFICATE OF CONVENIENCE AND NECESSITY.

"(a) *Necessity for; Motor Carriers in Bona Fide Operation on June 1, 1935.* Except as otherwise provided in this section and in section 310a, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public

highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, subject to section 310, if any such carrier or predecessor in interest was in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in *bona fide* operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of *bona fide* operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307 (a) of this chapter and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve

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such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter. (As amended June 29, 1938, c. 811, §8, 52 Stat. 1238.)

"(b) *Application for Certificate; Form and Contents.* Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission." (Feb. 4, 1887, c. 104, Part II, §206; as added Aug. 9, 1935, c. 498, 49 Stat. 551, as amended June 29, 1938, c. 811, §8, 52 Stat. 1238.)

"§307. ISSUANCE OF CERTIFICATE.

"(a) *Issuance Authorized to Qualified Applicants for Regular Routes and Between Fixed Termini.* Subject to section 310, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: Provided, however, That no such certificate

shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

"(b) *Certificate not to Confer Proprietary or Property Rights in Highway.* No certificate issued under this chapter shall confer any proprietary or property rights in the use of public highways."

"§309. CONTRACT CARRIERS BY MOTOR VEHICLE.

"(a) *Permit Essential to Operation: Carriers in Bona Fide Operation on July 1, 1935; Laws Relating to National Parks and Monuments Unaffected.* Except as otherwise provided in this section and in section 310a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: Provided, That, subject to section 310, if any such carrier or a predecessor in interest was in *bona fide* operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in *bona fide* operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of *bona fide* operation

to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: Provided further, That nothing in this chapter shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States. (As amended June 29, 1938, c. 811, §9, 52 Stat. 1238.)

"(b) *Application for Permit; Form and Contents; Issuance of Permits; Terms and Conditions.* Applications for for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract

carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the policy declared in section 302 (a) of this chapter; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 304 (a) (2) and (6): Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

"§310. DUAL OPERATION.

"No person, after January 1, 1936, shall at the same time hold under this chapter a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared in section 302 (a) of this chapter."

"§316. (b) *Rates, Facilities for Carriers of Property.* It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, ob-

serve, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

"(c) *Through Routes and Joint Rates.* Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

"(d) *Undue Preference or Prejudice Prohibited.* It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, or description of traffic in any respect whatsoever, or to subject any particular person, port, gateway, locality, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, That this paragraph shall not be construed to apply to discriminations, prejudice or disadvantage to the traffic of any other carrier of whatever description."

"§318. SCHEDULES OF CONTRACT CARRIERS BY MOTOR VEHICLE.

"(a) *Filing and Posting Schedules and Contracts Affecting Rates; Notice of and Hearing on Proposed Changes; Undue Preferences.* It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules or, in the discretion of the Commission, copies of contracts containing the minimum charges of such carrier for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this chapter, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed and posted in accordance with the provisions of this chapter. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules or copies of contracts, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and it shall be unlawful

for any such carrier by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed or prescribed: Provided, That any such carrier or carriers, or any class or group thereof may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the policy declared in section 302 (a) of this chapter."

"§322. UNLAWFUL OPERATION.

"(a) *Violation of Chapter or Rules or Orders; Penalty where none Otherwise Provided.* Any person knowingly and willfully violating any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense."

"§327. EFFECTIVE DATE OF CHAPTER. This chapter (except this section, which shall become effective immediately upon approval) shall take effect and be in force on and after the 1st. day of October, 1935: Provided, however, That the Commission shall, if found by it necessary or desirable in the public interest, by general or special order, postpone the taking effect of any provision of this chapter to such time after the 1st. day of October, 1935, as the Commission shall prescribe, but not beyond the 1st. day of April, 1936."

PERTINENT FEDERAL LIQUOR CONTROL LAWS.

XXI AMENDMENT TO CONSTITUTION OF THE UNITED STATES.

"SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

WILSON ACT.

U. S. C. A., Title 27, Section 121.

"§121. STATE STATUTES AS OPERATIVE ON TERMINATION OF TRANSPORTATION; ORIGINAL PACKAGES. All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. (Aug. 8, 1890, c. 728, 26 Stat. 313.)"

WEBB-KENYON ACT.

U. S. C. A., Title 27, Section 122.

"§122. SHIPMENTS INTO STATES HAVING DRY LAWS; PROHIBITION. The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited. (Mar. 1, 1913, c. 90, 37 Stat. 699; Aug. 27, 1935, c. 740, §202 (b) 49 Stat. 877.)"

LIQUOR ENFORCEMENT ACT OF 1936.

U. S. C. A., Title 27, Sections 221 to 228, inclusive.

"§221. CITATION OF CHAPTER.

"This chapter may be cited as the '*Liquor Enforcement Act of 1936.*' (June 25, 1936, c. 815, §1, 49 Stat. 1928.)"

"§222. DEFINITIONS.

"(a) Wherever used in this chapter the word 'State' shall mean and include every State, Territory, and possession of the United States, unless otherwise specifically provided.

"(b) As used in this chapter the word 'vessel' includes every description of water craft used, or capable of being used, as a means of transportation in water or in water and air; and the word 'vehicle' includes animals and every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land or through the air. (June 25, 1936, c. 815, §2, 49 Stat. 1928.)"

"§223. TRANSPORTING INTO STATE WHERE SALE PROHIBITED; PENALTY; STATE DEFINITION OF INTOXICATING LIQUOR ADOPTED.

"(a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(b) In order to determine whether any one importing, bringing, or transporting intoxicating liquor into any State, or any one attempting so to do, or assisting in so doing, is acting in violation of the provisions of this chapter, the definition of intoxicating liquor contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited in such State. (June 25, 1936, c. 815, §3, 49 Stat. 1928.)"

"§224. SEIZURE AND FORFEITURE.

"All intoxicating liquor involved in any violation of this chapter, the containers of such intoxicating liquor, and every vehicle or vessel used in the transportation thereof, shall be seized and forfeited. Such seizure and forfeiture, and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and dispositions of property or proceeds, for violation of the internal-revenue laws. (June 25, 1936, c. 815, §4, 49 Stat. 1928.)"

"§225. ENFORCEMENT; CONFERRING POWERS AND DUTIES; REGULATIONS.

"The Secretary of the Treasury shall enforce the provisions of this chapter and of sections 388 to 390 of Title 18.

"The Secretary of the Treasury is authorized to confer and impose upon the Commissioner of Internal Revenue and any of his assistants agents or employees and upon any other officer employee or agent of the Treasury Department any of the rights, privileges, powers, duties, and protection conferred or imposed upon the Secretary of the Treasury, or any officer or employee of the Treasury Department, by this chapter, or by *any law now or hereafter in force relating to* the taxation, importation, *exportation, transportation,* manufacture, *possession,* or use of, or traffic in, distilled spirits, wine, fermented liquors, or denatured alcohol." (Italics ours.)

"Regulations to carry out the provisions of this chapter shall be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. (June 25, 1936, c. 815, §5, 49 Stat. 1929.)"

"§226. EFFECT ON OTHER LAWS; CANAL ZONE.

"Nothing contained in this chapter shall repeal any other provisions of existing laws except such provisions

of such laws as are directly in conflict with this chapter and nothing in this chapter shall apply to the Canal Zone. (June 25, 1936, c. 815, §10, 49 Stat. 1930.)"

"§227. SEPARABILITY PROVISION.

"If any provision of this chapter, or the application thereof to any person or circumstances, be held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstance, shall not be affected thereby. (June 25, 1936, c. 815, §11, 49 Stat. 1930.)"

"§228. EFFECTIVE DATE.

"This chapter shall be effective as of the thirtieth day following June 25, 1936. (June 25, 1936, c. 815, §12, 49 Stat. 1930.)"

KNOX ACT.

U. S. C. A., Title 18, Section. 390.

"§390. (CRIMINAL CODE, section 240.) SAME; SHIPPING PACKAGES IN INTERSTATE COMMERCE NOT PLAINLY MARKED.

"Whoever shall knowingly ship or cause to be shipped from one State or Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, any package of or package containing any spirituous, vinous, malted, or other fermented liquor, or any compound containing any spirituous, vinous, malted, or other fermented liquor fit for use for beverage purposes, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than $1,000 or imprisoned not more than

one year, or both; and such liquor shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law. (As amended June 25, 1936, c. 815, §8, 49 Stat. 1930.)"

PERTINENT PROVISIONS OF: FEDERAL ALCOHOL ADMINISTRATION ACT

(Being Act of Cong. Aug. 29, 1935, c. 814, Sec. 1, 49 Stat. 977, U. S. C. A., Title 27, Sec. 201, et seq.)

"§205. UNFAIR COMPETITION AND UNLAWFUL PRACTICES.

"It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate. * * *

"(e) *Labeling.* To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Administrator, with respect to packaging, marking, branding, and labeling and size and fill of container (1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Administrator finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or

statements likely to be considered as statements of, alcoholic content of malt beverages are hereby prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the product; (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled; (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; and (5) as will prevent deception of the consumer by use of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, and as will prevent the use of a graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been indorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization: Provided, That this clause shall not apply to the use of the name of any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer, wholesaler, retailer, bottler, or warehouseman, of distilled spirits, wine, or malt beverages, nor to the use by any person of a trade or brand name used by him or his predecessor in interest prior to August 19, 1935; including regulations requiring, at time of release

from customs custody, certificates issued by foreign governments covering origin, age and identity of imported products; Provided further, That nothing herein nor any decision, ruling, regulation or other action of any Department of the Government or official thereof shall deny the right of any person to use wholly or in part the wine names or brands Port, Sherry, Burgundy, Sauterne, Haut Sauterne, Rhine (Hock), Moselle, Chianti, Chablis, Tokay, Malaga, Madeira, Marsala, Claret, Vermouth, Barbera, Cabernet, Saint Julien, Riesling, Zinfandel, Medoc, or Cognac, or any other geographic name of foreign origin (except Champagne), upon any of the foregoing produced in the United States if of the same type and the use of such name or brand is qualified by the name of the State or other locality in the United States in which the product is produced, and, in the case of the use of such name or brand on any label or in any advertisement, if such qualification is as conspicuous as such name or brand: And provided further, That except as herein expressly provided as to said names or brands, nothing in this section shall be held in any wise to affect or abridge any of the powers granted to the Federal Alcohol Administration to provide standards of identity, quality, labeling, or other regulations.

"It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon distilled spirits, wine, or malt beverages held for sale in interstate or foreign commerce or after shipment therein, except as authorized by Federal law or except pursuant to regulations of the Administrator authorizing relabeling for purposes of compliance with the requirements of this subsection or of State law.

"In order to prevent the sale or shipment or other introduction of distilled spirits, wine, or malt beverages in interstate or foreign commerce, if bottled, packaged, or labeled in violation of the requirements of this subsection, (1) no bottler of distilled spirits, no producer, blender,

or wholesaler of wine, or proprietor of a bonded wine storeroom, and no brewer or wholesaler of malt beverages shall bottle, and (2) no person shall remove from customs custody, in bottles, for sale or any other commercial purpose, distilled spirits, wine or malt beverages, respectively, after such date as the Administrator fixes as the earliest practicable date for the application of the provisions of this subsection to any class of such persons (but not later than August 15, 1936, in the case of distilled spirits, and December 15, 1936, in the case of wine and malt beverages, and only after thirty days' public notice), unless, upon application to the Administrator, he has obtained and has in his possession a certificate of label approval covering the distilled spirits, wine, or malt beverages issued by the Administrator in such manner and form as he shall by regulations prescribe: Provided, That any such bottler of distilled spirits, or producer, blender, or wholesaler of wine, or proprietor of a bonded wine storeroom, or brewer or wholesaler of malt beverages shall be exempt from the requirements of this subsection if, upon application to the Administrator, he shows to the satisfaction of the Administrator that the distilled spirits, wine, or malt beverages to be bottled by the applicant are not to be sold, or offered for sale, or shipped or delivered for shipment, or otherwise introduced, in interstate or foreign commerce. Officers of internal revenue are authorized and directed to withhold the release of distilled spirits from the bottling plant unless such certificates have been obtained, or unless the application of the bottler for exemption has been granted by the Administrator; and customs officers are authorized and directed to withhold the release from customs custody of distilled spirits, wine, and malt beverages, unless such certificates have been obtained. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States court for any Territory shall have jurisdiction of suits to enjoin, annul, or suspend in whole or in part any final

action by the Administrator upon any application under this subsection; * * *. (Aug. 29, 1935, c. 814, §5, 49 Stat. 981; Feb. 29, 1936, c. 105, §2, 49 Stat. 1152; June 26, 1935, c. 830, Title V, §§505, 506, 49 Stat. 1965, 1966.)"

* * * *

"§207. PENALTIES; JURISDICTION; COMPROMISE OF LIABILITY.

"The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States Court for any Territory, of the District where the offense is committed or threatened or of which the offender is an inhabitant or has his principal place of business, are hereby vested with jurisdiction of any suit brought by the Attorney General in the name of the United States, to prevent and restrain violations of any of the provisions of this chapter. Any person violating any of the provisions of section 203 or section 205 of this title shall be guilty of a misdemeanor and upon conviction thereof be fined not more than $1,000 for each offense. Subject to the approval of the Attorney General, the Administrator is authorized, with respect to any violation of this chapter, to compromise the liability arising with respect to such violation (1) upon payment of a sum not in excess of $500 for each offense, to be collected by the Administrator and to be paid into the Treasury as miscellaneous receipts, and (2) in case of repetitious violations and in order to avoid multiplicity of criminal proceedings, upon agreement to a stipulation that the United States may, on its own motion upon five days' notice to the violator, cause a consent decree to be entered by any court of competent jurisdiction enjoining the repetition of such violation. (Aug. 29, 1935, c. 814, §7, 49 Stat. 985.)"

* * * *

"§209. DISPOSAL OF FORFEITED ALCOHOLIC BEVERAGES.

"(a) All distilled spirits, wine, and malt beverages forfeited, summarily or by order of court, under any law of

the United States, shall be delivered to the Secretary of the Treasury to be disposed of as hereinafter provided.

"(b) The Secretary of the Treasury shall dispose of all distilled spirits, wine and malt beverages which have been delivered to him pursuant to subsection (a)—

"(1) By delivery to such Government agencies as, in his opinion, have a need for such distilled spirits, wine, or malt beverages for medicinal, scientific, or mechanical purposes; or

"(2) By gift to such eleemosynary institutions, as in his opinion, have a need for such distilled spirits, wine or malt beverages for medicinal purposes; or

"(3) By destruction.

"(c) No distilled spirits, wine, or malt beverages which have been seized under any law of the United States, may be disposed of in any manner whatsoever except after forfeiture and as provided in this section.

"(d) The Secretary of the Treasury is authorized to make all rules and regulations necessary to carry out the provisions of this section.

"(e) Nothing in this section shall affect the authority of the Secretary of the Treasury, under the customs or internal-revenue laws, to remit or mitigate the forfeiture, or alleged forfeiture, of such distilled spirits, wines, or malt beverages, or the authority of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to compromise any civil or criminal case in respect of such distilled spirits, wines or malt beverages prior to commencement of suit thereon, or the authority of the Secretary of the Treasury to compromise any claim under the customs laws in respect of such distilled spirits, wines, or malt beverages. (Aug. 29, 1935, c. 814, §9, 49 Stat. 987, as amended June 26, 1936, c. 830, Title V, §507, 49 Stat. 1966.)"